In the Supreme Court of the United States

OCTOBER TERM 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU,
Appellant,

vs.

WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA.

Brief of Appellant California State Automobile Association Inter-Insurance Bureau

On Appeal from the District Court of Appeal of the State of California, First Appellate District.

MAURICE E. HARRISON,
MOSES LASKY,
HERMAN PHLEGER,
111 Sutter Street, San Francisco 4, Calif.
Attorneys for Appellant.

BROBECK, PHLEGER & HARRISON,
111 Sutter Street, San Francisco 4, Calif.
Of Counsel.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

Page

IV. Even if the Rules Pertaining to Public Utilities Were Now to Be Extended to Insurance, the Statute Could Not Constitutionally Compel Appellant to Insure Non-Members, That Being Beyond the Scope of Its Dedication 42

Service to Members of the Association Is the Utmost Limit of Appellant's Dedication 46

The Scope of One's Dedication Is Measured by What It Has Done in Fact 48

A Cooperative May Not Be Compelled to Serve Non-Members 52

The Wide Scope of Control Over Corporations Is No Measure of a State's Power Over Others 54

V. The Statute Cannot Be Sustained on the Theory That It Does Not Compel Appellant to Insure Non-Members but Merely Terminates Its Right to Do Business if It Declines. The Doctrine of Unconstitutional Conditions Precludes That Theory 55

Appellant's Right to Do Business Is Not a Privilege Derived from the State 59

VI. No Decided Case Sustains the Legislation Here Assailed 61

VII. Public Policy Does Not Permit the State to Impose on Private Parties the Burden of Effectuating Public Ends 66

There Has Been No Declaration of Public Policy by the State in Any True Sense 70

Conclusion 73

Appendix I: California Assigned Risk Law ..... App. 1

Appendix II: California Provisions Concerning Reciprocals ..... App. 5

Appendix III: California Provisions Referred to in Section Relating to Jurisdiction ..... App. 7

TABLE OF AUTHORITIES CITED

CASES	Pages
Adair v. United States, 208 U.S. 161 (Dissent of Holmes, J.)	40, 41n
Adkins v. Children's Hospital, 261 U.S. 525 (Dissent of Holmes, J.)	41
Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466	37n
American Federation of Labor v. American Sash & Door Co., 335 U.S. 538	27n
American Railway Express Co. v. Levee, 263 U.S. 19	3
Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 169 Pac. 62	37n
Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3 Cir.)	25
Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N.E. 262	61n
Champlin Refining Co. v. United States, 329 U.S. 29	39
Chicago G. W. R. R. Co. v. Basham, 249 U.S. 164	3
Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. ....., 95 L.Ed. 156	36n
Coombes v. Getz, 285 U.S. 434	64
Dahnke-Walker Co. v. Bondurant, 257 U.S. 282	3, 14
Dairymen's Cooperative Sales Assn. v. Public Service Comm., 318 Pa. 381, 177 A. 770	52, 54
Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 Pac.2d 885	58
Delaware L. & W. R. R. Co. v. Morristown, 276 U.S. 182	45
Del Mar Water L. & P. Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591	49
Department of Banking v. Pink, 317 U.S. 264	3
De Pauw University v. Public Service Comm. of Oregon, 253 Fed. 848	49, 50n
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373	31n
Employers Liability Assurance Corporation v. Frost, 48 Ariz. 402, 62 Pac.2d 320	20, 32, 64, 65
Escobedo v. State of California, 35 Cal.2d 870, 222 Pac.2d 1	24
Ex parte Poresky, 290 U.S. 30	63n

Pages

Factory Mutual Liability Ins. Co. v. Justices of S. Court, 300 Mass. 513, 16 N.E.2d 38 ..... 62, 63
Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U.S. 565 25
Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426 57
Fordham Bus Corporation v. United States, 41 F. Supp. 712 ..... 40, 48
Forsyth v. San Joaquin Light etc. Co., 208 Cal. 397, 281 Pac. 620 44
Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 ..... 37, 38, 44, 52, 55, 60, 64

Garkane Power Company v. Public Service Commission, 100 Pac. 2d 571, 98 Utah 466 ..... 53, 54
German Alliance Insurance Company v. Lewis, 233 U.S. 389 ..... 34, 35
Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2 Cir.) 25
Green v. The Commonwealth, 12 Allen (Mass.) 155 ..... 61n
Greenwood v. Freight Co., 105 U.S. 13 ..... 62n

Hague v. C.I.O., 307 U.S. 496 58
Hamilton v. Regents, 293 U.S. 245 ..... 3, 14
Hannegan v. Esquire, 327 U.S. 146 59
Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 13
Hissem v. Guran, 112 Ohio St. 59, 146 N.E. 808 52
Hollywood Chamber of Commerce v. Railroad Commission, 192 Cal. 307, 219 Pac. 983 ..... 37n, 46n
Hoopeston Canning Co. v. Cullen, 318 U.S. 313 ..... 41, 42
Hudson Water Co. v. McCarter, 209 U.S. 349 31
Hughes v. Superior Court, 339 U.S. 460 ..... 13n
Hurtado v. California, 110 U.S. 516 ..... 29, 30

In re Minnesota Insurance Underwriters, 36 F.2d 371 59
In re Opinion of the Justices, 251 Mass. 569, 147 N.E. 681 ..... 61, 64
International Brotherhood of Teamsters etc. v. Hanke, 339 U.S. 470 13n
Interstate Commerce Commission v. Oregon Washington R. Co., 288 U.S. 14 50

James v. Marinship Corporation, 25 Cal.2d 721, 155 Pac.2d 329 ..... 42n

K. C. Working Chemical Co. v. Eureka Security F. & M. Ins. Co., 82 C.A.2d 120, 185 Pac.2d 832 26
Karrick v. Hannaman, 168 U.S. 328 26

Pages

Lamont Building Co. v. Court, 70 N.E.2d 447, 147 Ohio St. 183.... 25n
Lincoln Federal Labor Union v. Northwestern I. & M. Co., 335 U.S. 525 40
London Assurance Company v. Drennen, 116 U.S. 461..... 26
Lyons v. Prince, 281 N.Y. 557, 24 N.E.2d 466..... 72

Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548..... 2, 3
Mayor of Lynn v. Commissioner of Civil Service, 269 Mass. 410, 169 N.E. 502..... 61n
Michigan Commission v. Duke, 266 U.S. 570.....37, 38, 45
Miller v. Milwaukee, 272 U.S. 713..... 58
Minnesota Insurance Underwriters, In re, 36 F.2d 371..... 59
Mitchell v. Pacific Greyhound Lines, 33 C.A.2d 53, 91 Pac.2d 176.. 53n
Morel v. Railroad Commission, 11 Cal.2d 488, 81 Pac.2d 144.....38n, 45
Motor Haulage Co. v. Maltbie, 293 N.Y. 338, 57 N.E.2d 41.....44, 45

Nashville, C. & S. L. Ry. v. Walters, 294 U.S. 405.....23, 69
National Labor Relations Board v. Jones & Laughlin, 301 U.S. 1.... 41n
National Union Fire Ins. Company v. Wanberg, 260 U.S. 71....20, 32, 61
Nebbia v. New York, 291 U.S. 502....21, 22, 33, 34, 38, 40, 42, 43, 54, 60
Neustadt v. Employers Liability Assurance Corp., 303 Mass. 321, 21 N.E.2d 538..... 64
New York Life Insurance Co. v. Cravens, 178 U.S. 389..... 55
Northern Pacific Railroad Co. v. North Dakota, 236 U.S. 585..... 46

Opinion of the Justices, In re, 251 Mass. 569, 147 N.E. 681..... 61
Osborn v. Ozlin, 310 U.S. 53.....42, 60
Overland P. Co. v. Union L. Co., 57 Cal. App. 366, 207 Pac. 412.... 25n
Oyama v. California, 332 U.S. 633..... 58

Pacific Telephone & Telegraph Company v. Eshleman, 166 Cal. 640, 137 Pac. 1119..... 46
Packard v. Banton, 264 U.S. 140..... 55
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393.....23, 34, 68, 69
Phelps-Dodge Corporation v. National Labor Relations Board, 313 U.S. 177..... 41n
Phillips Petroleum Co. v. Jenkins, 297 U.S. 629.....56, 64
Poresky, Ex Parte, 290 U.S. 30..... 63
Producers Transportation Co. v. Railroad Commission, 251 U.S. 228 .....37, 45

Pages

Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 ..... 55n

Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573 ..... 36n
Railway Mail Association v. Corsi, 326 U.S. 88 ..... 41n
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 ..... 36n
Roig v. People of Puerto Rico, 147 F.2d 87 (1 Cir.) 39
R. Simpson & Co. v. Commissioner, 321 U.S. 225 63

Saia v. New York, 334 U.S. 558 71
Smith v. Cahoon, 283 U.S. 553 ..... 37, 45
Southern California Edison Co. v. Railroad Commission, 194 Cal. 757, 230 Pac. 661 49
State v. Nelson, 65 Utah 457, 238 Pac. 237 ..... 52, 53
State v. Public Service Commission, 275 Mo. 483, 205 S.W. 36 ..... 44, 50
Stephenson v. Binford, 287 U.S. 251 ..... 13, 37, 38, 40
Stimson Lumber Co. v. Kuykendall, 275 U.S. 207 45
Sullivan v. Texas, 207 U.S. 416 3

Terminal Taxicab Co. v. District of Columbia, 241 U.S. 252 ..... 37, 49
Texas Employers Insurance Assn. v. United States Torpedo Co., 8 S.W.2d 266 (Tex. Civ. App.), 26 S.W.2d 1057 (Tex. Com. App.) 65
Texoma Natural Gas Co. v. Railroad Commission of Texas, 59 F.2d 750 ..... 45, 57
Thayer v. California Development Board, 164 Cal. 117, 128 Pac. 21 44
Thomas v. Collins, 323 U.S. 516 58
Thompson v. Consolidated Gas Co., 300 U.S. 55 ..... 35, 36n, 37, 38, 45, 58

Union Pacific Railroad Co. v. Commission, 248 U.S. 67 55
United States v. Colgate & Co., 250 U.S. 300 25
United States v. Morton Salt Co., 338 U.S. 632 54

Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 71
Washington v. Superior Court, 289 U.S. 361 55
Waters-Pierce Oil Co. v. Texas, 177 U.S. 28 54
Webster v. Fall, 266 U.S. 507 63

Pages

West Coast Hotel Co. v. Parrish, 300 U.S. 379 41
Western Union Telegraph Co. v. Foster, 247 U.S. 105 57
Wheeling Steel Corp. v. Glander, 337 U.S. 562 54
Winship v. United States Bank, 5 Pet. (U.S.) 529 26
Winters v. New York, 333 U.S. 507 13
Wolf v. Colorado, 338 U.S. 25 30

Yick Wo v. Hopkins, 118 U.S. 356 ..... 30, 71

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

California Assigned Risk Law (Cal. Stats. of 1947, Ch. 39, p. 525, as amended, Stats. of 1947, Ch. 1205, p. 2714) ..3, 4, 13, 17, 66n. App. 1
As originally enacted:
Section 1 8
Section 2 ..... 9, 14

California Assigned Risk Plan (Cal. Adminis. Code, Title 10, Secs. 2400-2498 ..... 4, 5, 11, 13, 18, 72
Section 2445.1 ..... 5, 12
Section 2445.15 ..... 5, 12

California Code of Civil Procedure:
Section 961 ..... 2, App. 7
Section 1094.5 ..... 16n
Section 1094.5(b) 14n

California Constitution:
Article IV, Section 1 ..... 9n
Article VI, Sections 4, 4(b), 4(c) ..... 2, App. 7

California Financial Responsibility Law (Vehicle Code, Secs. 419-420.9) 24, 66n

California Government Code:
Section 9600 ..... 9n
Section 11523 (part of Administrative Procedures Act) 15, 16n

California Insurance Code:
Section 108 ..... 51n
Section 1300 ..... 50, App. 5
Section 1301 to 1306 ..... App. 5
Section 1307 ..... 7, 51, App. 5

Pages

California Insurance Code (Cont.):
Section 1308 ..... 51, App. 6
Section 1320 ..... 7, App. 6
Section 1450 ..... 6, App. 6
Section 11620 ..... 4, App. 1
Section 11621 ..... 4, 12, App. 1
Sections 11622 to 11624 ..... 4, App. 2
Sections 11625, 11626 ..... 4, App. 3
Section 11627 ..... 4, 5, App. 4

California Rules on Appeal, Rules 27(a), 27(b) and 28 ..... 2, App. 8

Defense Production Act of 1950, Sections 2, 401, 406 (Act of Sept. 8, 1950), c. 932; 50 U.S.C., App. Secs. 2062, 2101, 2106 ..... 25n

Fourteenth Amendment, Constitution of the United States 2, 3, 32, 67, 69, 71

Robinson Patman Act, Section 1 (Act of June 19, 1936, c. 592); 49 Stat. 1526; 15 U.S.C. Sec. 23(a) 25n

United States Code:
Title 28, Section 1257(2) 2, 3
Title 28, Section 2101(c) 2

TEXTS AND MISCELLANEOUS

Adler, Edward A., "Business Jurisprudence," 28 Harv. L. Rev. 135, 156, 157 ..... 44n

American Jurisprudence:
Vol. 11, p. 1059, Note 7 35
Vol. 12, p. 641 ..... 25n
Vol. 43, p. 572, Sec. 2 35
Vol. 43, p. 588, Sec. 22 ..... 45n

Annotation, 98 A.L.R. 226 54
Annotation, 132 A.L.R. 1495, 1498 54

Best's Insurance News:
January 1948, p. 33 ..... 66n, 68n
January 1948, p. 96 ..... 66n, 67n
March 1948, p. 31 ..... 11n, 68n
September 1948, p. 55 ..... 11n

Cooley on Torts (4th ed.), Vol. 2, Sec. 224, p. 178 25

Pages

Declaration of Independence 29n

Fletcher's Cyc. Corporations (Perm. ed.) Vol. 14 (1945 Rev. Vol.), Sec. 6692, p. 82 49

Frankfurter, Felix, "A Note on Advisory Opinions," 37 Harv. L. Rev. 1002 63

House Ways & Means Committee Hearings on Cooperative Organizations, November 4-26, 1947 ..... 72n

Hulbert, "Legal Phases of Cooperative Associations" (Bulletin No. 50, Farm Credit Administration, U. S. Department of Agriculture), p. 2 ..... 72n

Kelsen, Hans, "General Theory of Law and State" (Harvard 1949), pp. 266, 267 28

Miller, Justin, "Principles of Law Limiting Radio Broadcasting," 9 F.R.D. 217, 233 ..... 59n

Mullett, Charles F., "Fundamental Law and the American Revolution, 1760-1776" (Columbia University Press, 1933) 29n

Neumann, Franz, "Behemoth, The Structure and Practice of National Socialism" (Oxford Univ. Press, 1942), pp. 24-29, 51, et seq. 71n

Pacific Insurance Magazine, November 1948, p. 32 ..... 68n

Robinson, Gustavus H., "The Public Utility Concept," 41 Harv. L. Rev. 276, 303 44

"Survey of California Law, 1949-1950" (College of Law, University of Santa Clara), p. 108 ..... 14n, 66n

Vyshinsky, A. Y., "The Law of the Soviet State" (MacMillan 1948), pp. 314, 315 ..... 71n

Wyman, Public Service Corporations, Vol. 1:
p. 32 37
p. 167 44
p. 219 45
pp. 197, 198 44

Wyzanski, Charles, Jr., "The Open Window and the Open Door," 35 Cal. Law Rev. 336 27

In the Supreme Court of the United States

OCTOBER TERM 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU,
Appellant,

vs.

WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA.

Brief of Appellant California State Automobile Association Inter-Insurance Bureau

On Appeal from the District Court of Appeal of the State of California, First Appellate District.

OPINION BELOW

The opinion of the court below (R. 170) is reported in 96 C.A.2d 876 and in 216 Pac. 2d 882.

JURISDICTION

This is an appeal from the District Court of Appeal of the State of California, First Appellate District.

On November 13, 1950, this Court noted probable jurisdiction (R. 211).

Jurisdiction is invoked under Title 28 *U.S. Code*, Section 1257(2), which permits an appeal to this Court from a final judgment "rendered by the highest court of a State in which a decision could be had" where the validity of a state statute has been questioned as repugnant to the Constitution of the United States, and the decision is in favor of its validity.

The suit was one to annul an order of the Insurance Commissioner of California which deprives appellant of the right to do business. That decision is based on a California statute which appellant has assailed as being repugnant to the Fourteenth Amendment. The judgment of the court below upheld the statute.

The judgment was entered April 10, 1950 (R. 203). A petition for rehearing was filed April 25 and denied May 10, 1950, and a petition for hearing by the state Supreme Court was filed May 19 and denied June 8, 1950 (R. 203, 204).

Petition for appeal to this Court was presented to the District Court of Appeal and allowed on August 3, 1950 (R. 205).

The District Court of Appeal had jurisdiction to grant a rehearing within 30 days of its decision, on petition filed within 15 days. The state Supreme Court had jurisdiction to grant a hearing within 60 days of the decision on petition filed within 40 days. (Cal. Constitution, Art. VI, Sec. 4, 4(b) and (c); Rules 27(a), (b), and 28 of the Rules on Appeal issued by the California Judicial Council under authority of California Code of Civil Procedure, Section 961).*

The appeal is therefore timely. Title 28 *U.S.C.*, Sec. 2101(c); *Market Street Railway Co. v. Railroad Commission of California,*

NOTE: References to the printed record appear thus: (R. ....). All emphasis in quotations is added, unless otherwise stated.

*The full text of these provisions is set out in Appendix III to this brief.

324 U.S. 548; *American Railway Express Co. v. Levee*, 263 U.S. 19; *Department of Banking v. Pink*, 317 U.S. 264, 266; *Chicago G.W.R.R. Co. v. Basham*, 249 U.S. 164.

The judgment of the District Court of Appeal is that of the highest California court in which a decision could be had, since no appeal lies from its decisions to any other state court, and the state Supreme Court declined to exercise its discretionary power to grant a hearing. The judgment of the District Court of Appeal is therefore the judgment to be reviewed. *American Railway Express Co. v. Levee*, supra; *Sullivan v. Texas*, 207 U.S. 416.

In addition to the statute, there is involved a "plan" promulgated by the Insurance Commissioner of California under authority of the statute. Within the meaning of Title 28 *U.S.C.*, Section 1257(2), this "plan" is a statute of the state. *Hamilton v. Regents*, 293 U.S. 245, 258; *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 300.

QUESTION PRESENTED

Where a cooperative has set up an inter-insurance exchange or reciprocal by which members may insure each other against automobile accident liability, where the reciprocal has never insured non-members of the cooperative and the practice of insuring only members has constituted the reciprocal's basic policy since its inception years ago and the foundation of its existence, may a State, without violating the due process clause of the Fourteenth Amendment to the United States Constitution, compel it against its will to issue insurance to non-members of the cooperative and thereby subject each participant in the reciprocal to the damage liabilities of the unwanted risks, particularly where the risks are so hazardous that no insurer will accept them voluntarily?

Is a California statute—the Assigned Risk Law—which empowers the State Insurance Commissioner to issue a Plan compelling such a reciprocal to insure non-members, and is the Plan

promulgated by the Commissioner under authority of the law, constitutional under the Fourteenth Amendment?

And does an order of the Commissioner depriving the reciprocal of the right to do business for refusal to subscribe to and participate in the Plan deprive it and its members of property and liberty without due process?

STATUTES INVOLVED

The statute primarily involved is the *California Assigned Risk Law* (Cal. Stats. of 1947, Ch. 39, p. 525, as amended, Stats. of 1947, Ch. 1205, p. 2714; Sections 11620-11627, California Insurance Code). The material portions are:

Insurance Code, Sec. 11620:

> "The [insurance] commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. . . . All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein."

* * * * * * *

Sec. 11621:

> ". . . In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

Sec. 11625:

> "If an insurer admitted to transact liability insurance fails to subscribe to the plan or to any amendments thereto, the commissioner shall give 10 days' written notice to such insurer to so subscribe. If such insurer fails to comply with such notice, then the commissioner may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe. . . ."

Sec. 11627:

"In this article, 'insurer' includes reciprocal or inter-insurance exchanges."

This statute is set out in full in Appendix I to this brief.

Secondarily involved is the *California Assigned Risk Plan* issued by the Insurance Commissioner of California under the authority of the Assigned Risk Law (Cal. Administrative Code, Title 10, Sec. 2400-2498).

The material portions are:

Sec. 2405:

"Subject to the provisions of Section 11621 of the Insurance Code and Section 2449 of this Article, every insurer admitted to transact liability insurance shall participate in this Plan."

Sec. 2445.1:

". . . Without in any way limiting or enlarging the meaning of the term 'underwriting policy,' policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. . . ."

Sec. 2445.15:

"In the assignment of a risk when the applicant is a member of a Motor Club . . . preference shall be given to an insurer which confines its underwriting of risks not subject to the Plan to members of such Motor Club. . . . No such insurer may refuse to accept an assignment because the applicant is not a member of such Motor Club. . . ."

This plan is set out in full in the printed record (R. 10-32, 54).

STATEMENT OF THE CASE

A. Identity and Nature of Appellant.

Forty-four years ago California State Automobile Association* was formed as a motor club or cooperative of citizens selected for their interest in motoring to advance the interests of the motoring public. By 1914 a new want of its members was pressing for attention. Insurance rates were high and unsatisfactory. Consequently, the Association then "created appellant . . . in order to offer to its membership a plan of automobile insurance at a lower cost than the then prevailing rates" (R. 171).

Appellant is not a legal entity, although the law permits it to sue in a common name (Cal. Ins. Code, Sec. 1450). It is not organized for profit. It is a group of drivers banded together to insure each other and thus to keep down the cost of their own insurance. Each participant gives a power of attorney to a common agent to enter into reciprocal agreements of insurance and merely pays his share of the losses.

As stated in the opinion of the court below, "Obviously, it provides for a form of cooperative insurance by means of a joint venture or limited partnership." (R. 172.)

More specifically, appellant

> "is a reciprocal or inter-insurance exchange. It is open only to members of the Association. Its executive body, called the 'Insurance Board' is elected by the Board of Directors of the Association, and is composed of the same number of members as the board of directors of the Association. Participation by the members of the Association is voluntary. Each member desiring to join the Bureau executes a power of attorney to the same agent, authorizing him or it to enter into agreements of insurance. The members act as insurers of one another. No premiums, as such, are paid. Each member makes an annual deposit which is credited to him. The deposit fund is used to pay losses and expenses, for which pur-

*Hereafter called the Association.

poses a proportionate amount is deducted from the deposit of each member." (R. 172)

Unused portions of the deposit are refunded (R. 117, 123, 131).

As used through this brief, the term "appellant" therefore refers to the reciprocal and all its participants, who are called subscribers.

Ever since its organization it has been appellant's basic underwriting policy that only members of the Association are eligible to participate.

The case comes here upon the following express finding of fact:

> "That petitioner was formed and organized in the year 1914, solely for the purpose of making insurance available to, and has in practice limited its insurance coverage to 'Members of the California State Automobile Association or corporations or firms in which such members are officers or partners,' and has at all times thereafter existed solely for that purpose, and it has continued this practice in force. . . . From its inception it has at all times been and it is petitioner's basic policy that only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in petitioner." (R. 43, 44)

Appellant has not insured all members of the Association and has rejected those whose risks it regarded as undesirable (R. 74, 75). But it has never insured a non-member.

The basic charter or constitution of an insurance reciprocal is the power of attorney which each participant gives to the common attorney in fact (Cal. Ins. Code, Sec. 1307). This power of attorney must be filed with the Insurance Commissioner (Sec. 1320).* The power of attorney adopted by appellant on its crea-

*The sections of the Insurance Code showing the nature and character of a reciprocal are set out in Appendix II to this brief.

tion in 1914 and the powers of attorney used ever since have provided that they are "subject to all the limitations, modifications and restrictions contained in the rules and regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau." The very first rule of the rules adopted in 1914 provided that "Only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the Bureau." A similar rule has always been in effect (R. 57-64, 111, 112A, 113, 118A, 124, 125, 126A, 132, 134, 134A).

These rules were adopted because the Association wished "to furnish to our members, and to our members only, insurance at a reduced price if possible and under better conditions than could be obtained in the local market, and as we were not organized for profit we could not see the desirability of taking in any but our own members" (R. 72).

Every person who has participated in exchange of insurance contracts through appellant during its existence has signed the prescribed power of attorney (R. 97, 98).

B. The Statute Involved, Its Genesis and Nature.

On February 17, 1947, the State of California enacted the Assigned Risk Law (Cal. Stat. 1947, Ch. 39, p. 525). It contained two sections. The operating clause (Sec. 1) read:

> "After consultation with insurers admitted to transact automobile bodily injury liability insurance, the [Insurance] commissioner shall approve a reasonable plan for the equitable apportionment among such insurers of applicants for automobile bodily injury and property damage insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods and, when any such plan has been approved, all such insurers shall subscribe thereto and shall participate therein. Any applicant for such insurance, any person insured under such a plan

and any insurer affected may appeal to the commissioner from any ruling or decision of the manager or committee designated to operate such plan.

"In this section, 'insurer' includes reciprocal or interinsurance exchanges."

Before anything was done under the Act it was amended in June, 1947. The relevant provisions of the law as amended are quoted at pp. 4, 5, supra, but the amendment did not change the essential nature of the act.

The heart of the statute is that it empowered the Insurance Commissioner to issue a plan compelling insurers to enter into contracts of insurance with those whom they do not wish to insure, commanded insurers to subscribe to the plan, and empowered the Commissioner to deprive any insurer who refused to subscribe of the right to do business.

GENESIS OF THE STATUTE.

The genesis of the statute is disclosed by Section 2 of the original act.* That section contained the following recital:

"Under provisions of the Vehicle Code, certain persons who have been involved in motor vehicle law violations are required to file insurance policies or other evidence of financial responsibility with the State in order to continue lawfully to operate motor vehicles upon the public highways of the State.

"Because insurers are naturally reluctant to grant insurance to such persons, it has been necessary to devise a plan for allocating such risks upon an equitable plan to the insurers engaged in the business. Such a plan, dependent upon the voluntary consent of all insurers, has been in effect for

*That section was an "urgency" clause designed to bring the Act into immediate operation. Otherwise its effective date would be deferred until 91 days after the close of the legislative session. Cal. Government Code, Sec. 9600; Cal. Constitution, Art. IV, Sec. 1.

a number of years, but has recently ceased to operate because of the withdrawal of one of the subscribing insurers."

This recital mentions a voluntary plan and states the reason for the enactment to be the withdrawal of one of the participants. That participant was appellant. The plan had been adopted by insurers in 1942 and was in effect until January 1947 (R. 87).* Commercial insurers feared that unless they provided insurance for all those who wished to obtain it, the State would enter the field to supply the want and, once it had done so, would extend its service generally and become a competitor. The voluntary plan for the assignment of bad risks was adopted to forestall such state competition. Appellant participated, but it strictly adhered to its fundamental policy of insuring only members of the Association. It withdrew at the end of 1946.

These facts are epitomized in the opinion of the court below (R. 174, 175):

> ". . . various solutions were offered to the Legislature, one of which was that the State go into the insurance business and assume these and other risks. This was a solution opposed and feared by the insurance companies. Faced with these various pressures, in 1942, all insurance companies, handling automobile insurance in California, including appellant, adopted a voluntary 'assigned risk' plan, which provided a method for insuring some, but not all, of the groups that were unable, otherwise, to secure insurance . . .
>
> * * * * * * *
>
> "Appellant . . . was a subscriber to the voluntary plan, but all during the time it participated it adhered, strictly, to its policy of insuring only members of the California State Automobile Association, some of whom were members of the restricted groups. Late in 1946 or early in 1947, appellant withdrew from the plan. . . . The other insurers were reluctant to continue the voluntary plan under such

*The voluntary plan appears at R. 152-166.

circumstances. In this emergency the Legislature, then in session, promptly acted. It passed, as an emergency measure, the Compulsory Assigned Risk Law. . . ."*

To this recital may be added that the Legislature acted at the request of the commercial insurers. It was they who proceeded to the legislature upon appellant's withdrawal from the voluntary plan and with lightning speed obtained enactment of the law (R. 106).

Since appellant was not in business for profit, it was not its concern whether the State entered the insurance field. The law was enacted at the behest of commercial insurers for profit and was aimed at appellant.

THE ASSIGNED RISK PLAN.

Following the enactment of the statute, an assigned risk plan was proposed by the automobile insurers, and in October, 1947, the Insurance Commissioner held a hearing on it (R. 178). He promulgated the Assigned Risk Plan in December, 1947 (R. 54).

In the litigation below appellant made two contentions in addition to that now presented to this Court. These must be briefly de-

---

*Cf. Best's Insurance News (Fire & Casualty Edition, March, 1948, p. 31):

"The statement is being made more and more frequently that there is an obligation upon the part of the companies to provide insurance for all who wish to buy it, and failing to do so, we will be faced with state or government insurance."

The same fear was expressed even more clearly in another article dealing with assigned risk plans, in the same publication, September, 1948 (p. 55):

"If the industry fails to voluntarily provide an adequate insurance market to meet public needs we lose much of the defense, otherwise available, when agitation for a state insurance fund develops. We must recognize the tendency for government to absorb formerly private industry and as a rate regulation and supervision progresses and additional personnel becomes trained it will become an increasingly narrow step from supervision of the insurance business to actual operation."

scribed, since the decision of the court below on these points enters into the construction and terms of the statute.

When the statute was amended in June, 1947, a section was added which, appellant contended, gave it some relief. That section (Ins. Code, Sec. 11621) provided that "In so far as possible, assignments under the plan shall be consistent with . . . underwriting policies of each subscriber." Since appellant's basic policy was to insure only members of the Association, it urged that the statute did not authorize a plan which compelled it to insure non-members.

At the hearing called by the Insurance Commissioner to consider the plan proposed by insurers' committee,

> "Appellant appeared . . . and attacked the constitutionality of the Assigned Risk Law, but also stated that it would give consideration to accepting the plan voluntarily if the proposed plan were modified so as to give recognition to appellant's policy of insuring only members of the California State Automobile Association. This condition was not acceptable to the Commissioner nor to the committee." (R. 178)

The Insurance Commissioner wrote into the plan two provisions which expressly negatived appellant's contention. One (Sec. 2445.1) stated that "policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy." The other (Sec. 2445.15) stated that "No . . . insurer may refuse to accept an assignment because the applicant is not a member" of a motor club to members of which the insurer confines its underwritings. (R. 21).

In the subsequent proceedings appellant contended that the plan was not authorized by the statute.* But appellant's construction of the statute was rejected by the court below (R. 200-

*The construction of the statute urged by appellant would have obviated the constitutional question now presented to this Court, and that consideration was pressed below.

203). The statute has thus been construed as authorizing a plan which commands the appellant—a reciprocal whose basic policy and uniform practice have always been to limit participation to members of the Association—to admit non-members; that is to say, it would compel members of the Association who desire to enter into reciprocal contracts of insurance with one another to enter into such contracts with non-members as well.

As the case comes before this Court, the statute must be read as if this construction had been written into it by express language. *Winters v. New York*, 333 U.S. 507, 514; *Stephenson v. Binford*, 287 U.S. 251, 267.

The second contention was that the statute was void under the California Constitution as an improper delegation of legislative power to the Commissioner. The statute does not prescribe what persons insurers must insure but merely authorizes the Commissioner to issue a plan for the apportionment, "among insurers . . . of those applicants . . . who are in good faith entitled to but unable to procure such insurance through ordinary channels" (see p. 4, supra). The only standard for the guidance of the Insurance Commissioner in determining what persons insurers should be compelled to insure is to be found in the words "in good faith entitled." These words, appellant contended, leave the determination in the uncontrolled, arbitrary, and subjective consciousness of the Commissioner.

The court below rejected this contention. It held the statute to be a valid delegation of legislative power and the plan a valid exercise of that power (R. 194-200). By virtue of that decision the Assigned Risk Plan must be treated as an exercise of the power of the State of California. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 613.* The Assigned Risk Plan and the Assigned Risk Law together constitute the statute of the State

*Similarly, *Hughes v. Superior Court*, 339 U.S. 460, 466; *International Brotherhood of Teamsters etc. v. Hanke*, 339 U.S. 470, 479 and cases cited.

whose constitutionality is now before this Court for review. *Hamilton v. Regents*, 293 U.S. 245 at 258; *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 300.

CHARACTER OF THE RISKS WHICH THE STATUTE COMPELS INSURERS TO ASSUME.

The contracts forced upon insurers against their will are bad contracts; the risks which it compels them to insure are all abnormal and of such a hazard that no insurer will accept them voluntarily.

This fact is confessed by the statute itself. The "urgency clause" of the statute enacted in February, 1947, referred to "persons who have been involved in motor vehicle law violations" and stated that it was necessary to create a plan of compulsory assignment of risks "because insurers are *naturally* reluctant to grant insurance to such persons" (quoted p. 9, supra).

And as testified by the Insurance Commissioner's chief witness, the Manager of the Plan, "a risk is an assigned risk, necessarily comes to the Assigned Risk Plan, because it is not a normal risk"; "risks under the Asigned Risk Plan are contrary to the underwriting policies of the insurer or they couldn't come through the Assigned Risk Plan at all" (R. 96). By "underwriting policy" the witness meant a policy of not underwriting bad hazards (R. 95). Again, "risks that come through the Assigned Risk Plan are of such a hazard in nature that insurers will not accept them voluntarily" (R. 96).*

---

*In a review of the instant case in "Survey of California Law, 1949-1950" (College of Law, University of Santa Clara), p. 108, it is said that the risks are those who have been in accidents and such as "are usually considered to be substandard or bad risks."

Statistical evidence on the subject was offered by appellant at the administrative hearing but was rejected (R. 81, 86, 90, 92, 98-101). California law provides that on review of administrative hearings the court may consider rejected evidence if it should have been admitted. *Cal. Code of Civil Procedure*, Sec. 1094.5(b). Since the plan went into effect on January 19, 1948 (R. 11) and the hearing was held on March 5, 1948 (R. 51), the proffered statistics compare appellant's loss experience

C. The Proceedings Below; the Raising of the Constitutional Issue.

At the hearing called by the Insurance Commissioner in October, 1947, to consider a plan, appellant appeared and attacked the constitutionality of the statute (see p. 12, supra). When the plan was thereafter promulgated, appellant refused to subscribe to it.

In February, 1948, the Commissioner instituted proceedings before himself to suspend appellant's right to do business (R. 107-110). An administrative hearing was held on March 5, 1948 (R. 51). At the outset appellant objected thus:

> "The Statute under which this Plan which has just been placed in evidence as Exhibit 2 was issued and approved by the Insurance Commissioner is unconstitutional . . . because it deprives persons, and particularly this Respondent and its members, of property without due process of law; and likewise, deprives them of liberty without due process of law. And for that reason it violates the Fourteenth Amendment to the United States Constitution, and particularly, the Due Process Clause thereof." (R. 55)

On March 19, 1948, the Commissioner issued an order suspending appellant's right to transact automobile liability insurance business in California because of its refusal to subscribe to the plan (R. 6, 9, 43).

The California Administrative Procedures Act prescribes that decisions of administrative agencies may be judicially reviewed on

---

with that of insurers under the voluntary Assigned Risk Plan. In the period 1942 through 1945 appellant's loss ratio was only 50% (R. 98). That of all insurers on risks coming through the voluntary Assigned Risk Plan was 80% (R. 86, 101). Moreover, the risks insured by appellant which entered into its 50% ratio were normal and carried the ordinary charge (R. 100), but those written through the voluntary Plan and entering into the 80% figure were so bad that they averaged a premium of 140% of normal (R. 88, 89, 92). If the premiums had been comparable to those received by appellant, the loss ratio would have been well in excess of 100%, since loss ratio is a fraction of which the numerator is the losses and the denominator the premiums.

a petition for a writ of mandate.* On March 22, 1948 appellant filed in the Superior Court of the State of California in and for the City and County of San Francisco such a petition to annul the Commissioner's order (R. 1). The petition asserted in paragraph 7 (R. 3):

> "Said statute [Assigned Risk Law] purports to require insurers to issue insurance and accept risks against their will, and said statute, and the aforesaid plan purported to have been issued thereunder, and the decision of the Insurance Commissioner hereinabove referred to are and each of them is unconstitutional and void and violates each of the following provisions of the Constitution of the United States:
>
> "(a) The 14th Amendment as constituting a law depriving persons, and particularly your petitioner and its members, of property and liberty without due process of law."

In the Opening Statement in the Superior Court appellant said (R. 170):

> ". . . We do, of course, claim the statute is unconstitutional in requiring an insurer to cover anybody it does not desire to insure, but the point with respect to our petitioner is that it compels us to insure others than members of the California Automobile Association. In other words, our organization was a cooperative organized for the purpose of insuring members of the association and no others . . . ."

On September 29, 1948, the Superior Court, although finding all facts in appellant's favor, denied the petition for writ of mandate (R. 47) and held

> "that neither said statute nor said plan is invalid by reason of conflict with any provision of the Constitution of the State of California or of the United States." (R. 46)

---

*Government Code, Sec. 11523: "Judicial review may be had by filing a petition for writ of mandate in accordance with the provisions of the Code of Civil Procedure. . . ."

Code of Civil Procedure, Sec. 1094.5. "[Inquiry into validity of administrative order or decisions.]

* * * * * * *

"(e) The Court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. . . ."

An appeal was taken to the District Court of Appeal. That court states in its opinion (R. 181):

> "Appellant directs its main arguments against sections 11620 and 11627 of the Insurance Code, contending that, for various reasons, those sections deny to it due process of law in violation of the Fourteenth Amendment to the United States Constitution.
>
> * * * * * * *
>
> ". . . It is then argued that, even if the insurance business were subject to the same degree of control as a public utility, appellant cannot be compelled to accept non-member risks because appellant has heretofore restricted its operations to contracting only with members of the California State Automobile Association. Thus, it is contended, appellant is not a public insurer, and cannot be compelled to serve others."

On April 10, 1950, the District Court of Appeal affirmed the judgment. It held that "There is . . . no violation of the due process clause" (R. 193).

Appellant has continued in business by virtue of successive orders of the courts staying the Commissioner's order of suspension pending final judgment in the cause.

SPECIFICATION OF ASSIGNED ERRORS URGED

The assignments of error are set out in the record (pp. 207, 208). The District Court of Appeal erred

> 1. In holding that the California Assigned Risk Law (Cal. Stats. of 1947, Ch. 39, p. 525, as amended, Stats. of 1947, Ch. 1205, p. 2714; Sec. 11620-11627, Cal. Insurance Code), insofar as it compels, or empowers the Insurance Commissioner of the State of California to compel, petitioner and appellant and its members, against their will, to insure non-members of California State Automobile Association, does not violate and is not repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. In holding that the California Assigned Risk Plan (Cal. Administrative Code, Title 10, Sec. 2400-2498), promulgated by the said Insurance Commissioner under authority of the said Assigned Risk Law, insofar as it compels petitioner and appellant and its members, against their will, to insure non-members of California State Automobile Association, does not violate and is not repugnant to the due process clause of said Fourteenth Amendment.

3. In holding that the said Insurance Commissioner could and did validly and without violating said Fourteenth Amendment suspend the certificate of authority of petitioner and appellant to transact automobile liability insurance in California for failure to subscribe to said Assigned Risk Plan.

4. In failing to order, adjudge and decree that the decision of said Insurance Commissioner, made March 19, 1948, suspending petitioner and appellant's certificate of authority to transact automobile liability insurance in California, until it should subscribe to said Assigned Risk Plan, is invalid and void and should be annulled and set aside, as violating the said Fourteenth Amendment, and affirming the judgment of the Superior Court of the State of California in and for the City and County of San Francisco denying said petitioner and appellant's petition for writ of mandate to annul and set aside said decision of the Insurance Commissioner.

SUMMARY OF THE ARGUMENT

I.

The statute has three effects: (1) It commands insurers to enter into contracts against their will; (2) those contracts are abnormal and of such a hazard that no insurer will accept them voluntarily; (3) by compelling appellant to insure non-members of the Association, the statute forces it to change its basic nature as a cooperative and foists unwanted partners on its participants. In effect it compels careful drivers to pay damage judgments rendered against the reckless and uninsured.

Thereby it runs counter to several deep seated feelings: (1) That it is an inherent right of every man to refuse to deal with any person; as a particular instance, that an insurer is free to reject an application for any reason; and (2) that the law cannot make one another's partner without his consent. The statute also runs counter to freedom of association.

While the principles to be discussed may justify the conclusion that no insurer can constitutionally be compelled to insure an undesired risk, we present a narrower issue, whether a non-corporate cooperative organized solely to insure members of a specific group and always confining itself to that group may be forced to insure non-members.

In a broader aspect the issue is whether the power of the state over its citizens has now become so free of constitutional restraints that the state may compel natural persons to devote their property to public functions and to convert their free associations into organs of the state.

The court below concedes that the statute would have had to be declared unconstitutional a few years ago but relies on some new spirit. Basically its position rests on no decided case but on a political theory that state power must be unhampered. But the political philosophy on which the republic was founded is that there are some natural rights that no government may impair. This philosophy is embodied in the Due Process Clauses. Due process expresses all those rights that courts must enforce because they are basic to our free society. What they are is determined by the process of pricking out a line from case to case. For the issue in this case such a line has already been pricked out. The statute is on the wrong side of the line, and reason and sound policy require that it remain so. The recent developments in constitutional law do not support this statute. Appellant stands at the last barrier separating legislative power constitutionally restrained from legislative power subject to no restraint at all.

II.

Every decision in a controverted case directly bearing on the issue shows that a statute may not constitutionally compel one to insure another unwillingly. *National Union Fire Ins. Company v. Wanberg*, 260 U.S. 71; *Employers Liability Assurance Corporation v. Frost*, 48 Ariz. 402, 62 P.2d 320.

III.

The court below waves aside settled law by arguing that with *Nebbia v. New York*, 291 U.S. 502, this Court drastically expanded the immunity of the police power from the due process clause. Important as *Nebbia* was, its rationale does not go so far as to support the statute. What *Nebbia* held was that the degree to which business is subject to *regulation* does not depend, as was formerly supposed, on whether it is "affected with a public interest." It thereby merely subjected all business to the same power of regulation to which insurance was already subject.

Even regulation, if "it goes too far" violates due process. And an abyss separates regulation, however broad, from compulsion to serve or to contract. It has been elementary law that the fact that a business may be regulated for the public good does not imply that it can be compelled to serve the public.

The power to regulate, as expounded in *Nebbia* and later cases, is the power to prevent use of property to the detriment of others, prescribe the terms that will enter into a contract if one chooses to make the contract, prohibit injurious practices, impose standards of right conduct, suppress business and industrial conditions offensive to public welfare, curtail the area in which one may contract. But none of this comprehends power to compel one to contract.

A duty of compulsory service rest on public utilities, but it has always been held that to compel one not a public utility to enter into contracts against its will is a violation of due process. The cases since *Nebbia* continue to recognize this basic principle. They

also continue to recognize that the validity of regulation and of compulsion to serve present different problems.

IV.

The court below would extend the rule applicable to public utilities to the insurance business. This goes well beyond *Nebbia*. But it does not answer the issue appellant presents.

The essence of the public utility rule is that when one has voluntarily offered to deal with the public generally, he may not discriminate within the scope of his voluntary dedication. It is a rule against discrimination, not an extension of the scope of the party's offer. If he has not offered to deal generally with the public, he cannot be compelled to do so. The cases are legion that "consistently with the due process clause of the Fourteenth Amendment" a private utility may not be converted into a public utility by legislative fiat. On similar principles, a public utility cannot be compelled to serve beyond the limits of its voluntary dedication.

These principles have been applied with particular solicitude to protect cooperatives from being compelled to serve non-members.

If it be said that insurers engaged in business for profit have already offered to do business with the public generally and, by analogy to public utilities, may be compelled to serve within the full ambit of that offer, such argument can have no relation to appellant. The scope of its activities, the extent of its offer, the ambit of its dedication have been to serve only members of the Association.

The court below argues that appellant's dedication is to be measured by the powers general law would permit it to have and not by the admitted fact that it has always confined its insurance to a limited group. This is contrary to settled constitutional law. The extent of one's dedication is measured by a fact: whom has it held itself out as ready to serve? A corporation's charter may empower it to carry for the public generally; yet if it has never done

so or offered to do so, it may not be compelled to do so. The "important thing is what it does, not what its charter says."

Moreover, while California law permits reciprocals to be organized to insure everyone, appellant was not so organized. A particular reciprocal is limited by its power of attorney. Appellant's power of attorney has always limited insurance to members of the Association.

A state's power over corporations is no measure of its power over others.

V.

The court below finally admits that "no company can be compelled to assume a risk," but asserts that "if it refuses to accept an assigned risk, its right to do business in this state may be terminated."

But a lawful power of a state—even the power to grant or deny a privilege—cannot be exercised as an instrument to accomplish an unconstitutional result. A state is not permitted "to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it." Unless appellant can be compelled to insure non-members, it cannot be deprived of the right to do business for refusal to accept such risks.

The authorities, announcing this doctrine of unconstitutional conditions, limit a state's power to deny a privilege. *A fortiori,* they apply here, for appellant's right to do business is not a privilege derived from the state, appellant being merely a name in which individuals contract with each other. While that right may be regulated or limited, California has expressed no public policy against reciprocals. The deprivation of the right to do business is here a penalty for refusal to succumb to an unconstitutional imposition.

VI.

No decided case sustains the statute here assailed. The court below relied on a Massachusetts opinion and certain Texas cases.

In none of the Texas cases was the constitutional question involved, presented, argued or discussed. They contain dicta only.

The Massachusetts opinion was merely an advisory opinion to the legislature, arising outside of any factual controversy and given without benefit of argument of counsel. Moreover, it was expressly confined to corporations, whose charters were issued subject to the Massachusetts constitutional provision that the state may alter corporate rights or duties at will. The court did not deal with the unique facts and issue of the present case, which relate to an insurer non-corporate and created and dedicated to insure a specified group.

Even as so limited, the statute was said by the court to go to the verge of power, and later decisions of this Court discredit the reasoning of the opinion.

VII.

Because of the increase in automobile accidents and the public policy that the right to drive should be conditioned on possession of insurance or other financial responsibility, the court below concludes, with dubious logic, that public policy requires insurance to be made available to inferior drivers whom no one will insure voluntarily.

Granting that the legislature may declare such a public policy, it cannot be fulfilled at private cost but must be at public cost, as, for example, by a state insurance fund or taxation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (Holmes, J.); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (Brandeis, J.).

This case involves no issue of racial discrimination. The validity of anti-discrimination statutes rests on different considerations.

ARGUMENT

I.

The Effect of the Statute, the Issue Defined: Preliminary Considerations

The statute whose constitutionality we assail has three significant consequences:

1. It commands insurers to enter into contracts and to incur liabilities against their will.

2. The contracts forced upon the insurer against his will are bad contracts, the risks abnormal, from which financial loss may be expected (see p. 14, supra). The court below has sought to support the statute on the basis of public policy in requiring automobile drivers to be financially responsible.* In passing on the state Financial Responsibility Law, the state Supreme Court recently pointed out that "The compelling public interest here appears from the obvious carelessness and financial irresponsibility of a substantial number of drivers" and that the statute was justified by the fact that it applied to the "culpable," those against whom it is probable that judgments for negligence would be rendered. *Escobedo v. State of California,* 35 Cal.2d 870, 876, 878, 222 Pac.2d 1.

3. The statute, by compelling appellant to accept as subscribers those not members of the Association, forces it to alter its type of operations radically, to rewrite the terms of its existence, to violate its basic charter, and to cease to be what it was designed to be and always has been, a self-help cooperative.

As the court below recognizes, appellant is a form of partnership (p. 6, supra). Yet the statute foists on partners other and unwelcome partners.

Taking these three effects of the statute together, the statute is seen to be, in essence, the same as one which prescribes that after a judgment should be rendered for damages against an uninsured driver, that judgment should be paid prorata by careful drivers.

*To that argument we address ourselves at pp. 66 et seq. below.

At the threshold the statute runs counter to a deep seated feeling, often expressed as a principle, that "it is the inherent and inalienable right of every man freely to deal or refuse to deal with his fellow men"* and "to refuse . . . to deal with, any man or class of men as he sees fit."† This Court, in *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U.S. 565, 573, referred to this as a "right, 'long recognized'." The statement is frequently repeated. E.g., in *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99, 102 (3 Cir.); *United States v. Colgate & Co.*, 250 U.S. 300.

The great Judge Cooley called it a "civil right" (2 Cooley on Torts (4th ed.), Sec. 224, p. 178):

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern."

This passage is quoted approvingly from an earlier edition of Cooley in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 49 (2 Cir.),‡ and is cited with approval by this Court in *Federal Trade Commission v. Raymond Bros.-Clark Co.*, supra, at 573.

---

*12 Am. Jur. 641, quoted in *Lamont Building Co. v. Court*, 70 N.E.2d 447, 147 Ohio St. 183 (1946).

†*Overland P. Co. v. Union L. Co.*, 57 Cal. App. 366, 207 Pac. 412.

‡The opinion in that case concludes, "We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

This deep-seated feeling is reflected in the Defense Production Act of 1950: "Nothing in this title shall be construed to require any person to sell material or service, or to perform personal services." (Act of Sept. 8, 1950, c. 932, Sec. 406; 64 Stat. 807; 50 U.S.C., App., Sec. 2106.) The statute twice states the intention of Congress to proceed within the framework and with full consideration and emphasis on the maintenance of the "American system of competitive enterprise." (Secs. 2, 401; 50 U.S.C. App. Secs. 2062, 2101.) Similarly the Robinson Patman Act prescribes that nothing in it "shall prevent persons * * * from selecting their own customers in bona fide transactions and not in restraint of trade." (Act of June 19, 1936, c. 592, Sec. 1; 49 Stat. 1526; 15 U.S.C. Sec. 13 (a).)

Of course, the right to refuse to deal, like other rights, may not be used to restrain trade or create an unlawful monopoly.

As applied to the field of insurance, this right has been expressed in the elementary principle that "An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason. . . ." *K. C. Working Chemical Co. v. Eureka Security F. & M. Ins. Co.*, 82 C.A.2d 120, 131, 185 Pac.2d 832, and cases there cited.

The statute destroys that principle.

In its second, and especially in its third consequence, the statute runs counter to a still more fundamental feeling. As said by Chief Justice Marshall in *Winship v. United States Bank*, 5 Pet. (U.S.) 529, at 560: ". . . the liability of a partner arises from pledging his name. . . . No man can be pledged but by himself." It has often been said that the law cannot make one a partner of another without his free consent. *Karrick v. Hannaman*, 168 U.S. 328; *London Assurance Company v. Drennen*, 116 U.S. 461, 472.

Until now no state has sought to foist a partner upon another. Until now perhaps the only recorded instance of such conduct was to be found in Hitler Germany in the so-called "Aryanization of Jewish property."

Yet the present statute, in compelling appellant to assume liability for the negligence of non-members, has that effect.

In the discussion that follows many of the principles on which we rely may support the conclusion that the statute is unconstitutional in compelling any insurer to insure any undesired risk. But the issue we ask this Court to decide is not so broad.

We do not present the issue as respects corporations writing insurance.* We do not even present the issue as respects reciprocals or other non-corporate insurers engaged in business generally and for profit.

The appellant is a reciprocal organized solely to insure members of the Association. This was the reason for its birth, its

*Different considerations may apply to corporations. See pp. 54, 55 infra.

policy, and its undeviating practice (see pp. 6, 7, supra). It is a non-profit cooperative of individuals confining their reciprocal assumption of liabilities, their exchange of contracts, within a limited group.

The issue we present is whether appellant, so created and so existing, may constitutionally be compelled to assume liabilities of those outside the group which it was organized to serve—whether individuals who have banded together to insure each other may be compelled to insure outsiders.

We submit that the constitutionality of the statute in its application to appellant is governed by the same principles as a statute which should require a fraternal order such as the Masons or the Knights of Columbus to insure non-members if it wished to provide a system of life or disability insurance for its members, or which sought to compel the Farm Bureau Federation to insure those who were neither members nor farmers, if it sought to provide a system of automobile insurance for its members alone.

Judge Charles Wyzanski, Jr. has remarked that "By the time that James Bryce came to write his *American Commonwealth* and Gunnar Myrdal, his *American Dilemma,* freedom of association was considered a deeply rooted characteristic of American Society" ("The Open Window and the Open Door," 35 Cal. Law Rev. 336 at 346). In its 1945 Statement of Essential Human Rights the American Law Institute included the "Freedom to Form Associations." Yet freedom of association must include the correlative right to be free of having the uninvited guest forced upon one and his associates.*

---

*Lest we seem to assert more than we mean, we add that the right of association does not create a right to associate in restraint of competition or to achieve monopoly nor can it condone exclusion of those who are necessarily affected by the exercise of powers which the law confers on the group for the benefit of all including those sought to be excluded, as in the case of collective bargaining representatives and the problem of the "closed shop and the closed union." The right of association may be limited where it inflicts injury on individual rights.

As said by Mr. Justice Frankfurter, concurring in *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538 at 546: "The right

We have stated the precise issue which the case presents to the Court. In a broader sense, the case presents this fundamental issue: In the revulsion from yesteryears' over-rigid construction of the due process clause, has the vast power of the state over the lives of its citizens become so utterly free of constitutional restraints that the state, under the guise of "regulation," can compel natural persons to devote their property to public functions and to convert their free associations into organs of the state?

Basically, what underlies the opinion of the court below is not any rule of law heretofore announced or any principle to be found in the decisions—we shall show that the decided cases and the principles are against appellee—but a theory of political philosophy. It is the theory that the state should be unhampered in dealing with the problems, real or fictitious, great or small, that may confront it.

That theory is incompatible with the political philosophy upon which this Republic has been founded. As Professor Hans Kelsen points out in his *"General Theory of Law and State,"* that philosophy is made part of our positive law by the Constitution: The Fathers of the American Constitution believed in certain inborn rights—the theory of natural law current in the 18th century—and expressed that view in the Constitution, and these rights are therefore constitutionally protected as fully as if stated in the text of the Constitution.*

---

of association, like any other right carried to its extreme, encounters limiting principles . . . At the point where the mutual advantage of association demands too much individual disadvantage, a compromise must be struck." The conflict of rights explains decisions in various fields, and we shall refer to it again. (See footnotes on pp. 36 and 41, infra.) Problems such as these involve considerations quite different from those pertinent to the present case. By organizing to insure members of the Association and by so limiting itself, appellant impinges on no one's rights and subtracts nothing from them.

*Kelsen, General Theory of Law and State (Harvard, 1949), pp. 266, 267:

"A catalogue of freedoms or rights of the citizens is a typical part of

The protection of these rights is encompassed by the expression "due process" as found in the Fifth and Fourteenth Amendments. That expression embodies the concept of restraint on the legislative power, enforced by judicial process, *Hurtado v. California,*

---

modern constitutions. The so-called 'Bill of Rights' contained in the first ten Amendments to the Constitution of the United States is an example. These amendments mostly have the character of prohibitions and commands addressed to the organs of the legislative, executive, and judicial powers. They give the individual a right in the technical sense of the word only if he has a possibility of going to law against the unconstitutional act of the organ, especially if he can put into motion a procedure leading to the annulment of the unconstitutional act. This possibility can be given him only by positive law, and consequently the rights themselves can only be such as are founded in positive law.

"This, however, was not the view of the Fathers of the American Constitution. They believed in certain natural inborn rights, which exist independent of the positive legal order and which this order has only to protect—rights of individuals which the State has to respect under any circumstances, since these rights correspond to the nature of man and their protection to the nature of any true community. This theory—the theory of natural law—was current in the eighteenth century. It is clearly expressed in the Ninth Amendment: 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.' By this, the authors of the Constitution meant to say that there are certain rights which may neither be expressed in the constitution nor in the positive legal order founded thereupon. Nevertheless, the effect of this stipulation, from the point of view of positive law, is to authorize the State organs who have to execute the constitution, especially the courts, to stipulate other rights than those established by the text of the constitution. A right so stipulated is also granted by the constitution, not directly, but indirectly, since it is stipulated by a law-creating act of an organ authorized by the constitution. Such a right is thus no more 'natural' than any other right countenanced by the positive legal order. All natural law is turned into positive law as soon as it is recognized and applied by the organs of the State on the basis of constitutional authorization. Only as positive law is it relevant in juristic considerations."

During the pre-revolutionary period, there were numerous appeals to Magna Charta, which was regarded as an embodiment of some, but not all, of the fundamental rights of free men. See Mullett, "Fundamental Law and the American Revolution, 1760-1776" (Columbia University Press, 1933), where great numbers of examples are collected. In 1772, Samuel Adams declared than "an act of Parliament made against Magna Charta in violation of its essential parts is void" (quoted id. p. 99). In 1773, Charles Carroll quoted from Dr. Bonham's case for the same proposition (id. p. 106). And in 1776 the Declaration of Independence asserted as a self-evident fact that "all men . . . are endowed by their Creator with certain inalienable rights."

110 U.S. 516 at 535,* and that restraint is necessarily embodied in the idea of "a government of laws and not of men." *Yick Wo v. Hopkins,* 118 U.S. 356, 370.†

Concededly "due process" is not a rule like the rules of bills and notes, and we have been admonished that it did not install Herbert Spencer's Social Statics in the Constitution. But this Court has repeatedly shown that "due process" expresses rights not otherwise spelled out.

Only recently it said in *Wolf v. Colorado,* 338 U.S. 25 at 27:

> "Due process of law . . . is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. . . .
>
> ". . . The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.' . . ."

---

*This Court there said:

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

†This Court there said:

"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' "

The very meaning of pricking out a line from case to case must be that once the line is pricked out, it serves as a standard and a guide. It is not drawn on water, obliterated in the very act of drawing and leaving the law at sea with neither North Star nor compass. Cf. *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355.

The court below states, in effect, that appellant's contention that the statute is unconsitutional would be right—if the case had arisen a few years ago. But, it argues, the pertinent principles have somehow been superseded by new and recent concepts of constitutional law. For this point of view it relies on no decision in point but on a supposed new spirit animating the law. It is true that within recent years this Court has upheld legislation which formerly would have been considered invalid. But the present law goes far beyond what the rationale of such cases upholds. It differs not merely in degree but in fundamental kind.*

Appellant recognizes the developments in constitutional law on the subject of due process. But it stands at the last barrier dividing legislative power controlled by constitutional restraints from legislative power answerable only to pressure groups and vagrant majorities.

If the basic political theory of the Republic that state power is not unhampered is to remain, there must be *some* limits on state power, and we submit that if there are any limits, they have been exceeded in this case.

We proceed to show that this statute is on the wrong side of a line that has been clearly pricked out, that it is unconstitutional under the decided cases, and that reason and the soundest policy require that it remain so.

---

*Cf. the statement made in another context by Mr. Justice Holmes: " 'The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. . . . at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear.' " *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 411.

II.

The Authorities Directly Bearing on the Power to Compel the Issuance of Insurance Show the Statute to Be Unconstitutional

National Union Fire Insurance Company v. Wanberg, 260 U.S. 71, involved the constitutionality of a North Dakota statute which prescribed that if an application for hail insurance is not rejected within 24 hours it will be deemed to have been accepted. Although sustaining the constitutionality of the statute, this Court held that it went to the verge of the Constitution. It said (p. 74):

> ". . . Thus it is argued that by this statute mandatory obligation is substituted for freedom of contract, which is just that against which the Fourteenth Amendment was intended to secure persons. We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it."

The reason? Because

> "This does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours." (p. 76)

The basis of the decision was that the statute merely required prompt action in view of the suddenness of hail storms. It merely modified the rules of contract law as to the manner in which an offer could be accepted, by making silence for a prescribed interval equivalent to acceptance.

Since the North Dakota statute went to the verge of the state's power, the present statute passes the line.

Following the *Wanberg* case, it was squarely held in *Employers Liability Assurance Corporation v. Frost*, 48 Ariz. 402, 62 P.2d 320, that a statute which attempted to impose upon insurers the obligation to issue policies to applicants violated the due process clause of the Fourteenth Amendment. The conclusion was reached after full consideration by a unanimous court in an exceptionally careful and well reasoned opinion. Speaking of the *Wanberg* case, the court said (62 P.2d at 325):

"It is easy to surmise that the court's decision, if the North Dakota statute had made it mandatory on the insurance company to assume the hail insurance risk upon application, would have been that the limits of regulation had been transcended and the freedom of contract guaranteed by the Federal Constitution violated."

There is no decision to the contrary in any controverted case where the issue was presented.*

III.

The Broad Ambit of the Power to Regulate Does Not Support the Statute. A Wide Gap Separates Regulation, However Broad, from Compulsion to Serve or to Contract. The Latter Has Been Confined to Public Utilities.

The court below waves aside the foregoing law, by arguing that with *Nebbia v. New York*, 291 U.S. 502, this Court drastically expanded the police power and its immunity from the due process clause.

Important as *Nebbia* was, neither it nor any subsequent case has gone so far as to support the application of the Assigned Risk Law to appellant. Unquestionably *Nebbia* is a landmark. But it is necessary to perceive just what it did and why it is notable.

What it held was that the degree to which business is subject to *regulation*, does not, as was formerly supposed, depend on whether it is "affected with a public interest." More specifically, the issue was the power to regulate prices. Prior to *Nebbia* it was supposed that price regulation was regulation so extreme that the power to fix rates and prices was confined to businesses "affected with a public interest" (p. 531). *Nebbia* destroyed that requirement. Giving to it the utmost effect and generalizing its rule beyond price regulation, it may be said that since *Nebbia* the rubric "affected with a public interest" has no significance whatever (p. 536).

*The court below cites a certain Massachusetts advisory opinion and certain Texas dicta. We discuss them at pp. 61-65, infra.

In eliminating that rubric *Nebbia* merely subjected all business to the same broad power of regulation as that to which insurance had long been subject, for as far back as *German Alliance Insurance Company v. Lewis*, 233 U.S. 389, insurance had been said to be "affected with a public interest."

A decision placing all business on a par with insurance does not expand the power over insurance beyond the constitutional limits already fixed by this Court.

Insurance is peculiarly susceptible to "regulation." The statement is so elementary as to be pedantic. But it is necessary to make it in order to eliminate it from the case as a misleading and false guide. To state it does not resolve this case. It merely places one at the threshold.

To "regulate" is one thing. To compel one to enter into a contract against his will, to insure risks he does not wish to insure, to associate with those with whom he does not wish to contract, is quite another. A wide abyss separates the two.

The power to regulate is the power to impose standards of right conduct, to prohibit injurious practices. Under it, as expounded by this Court in *Nebbia* and later cases, the state may prevent the use of property to the detriment of others, prescribe the terms that will enter into a contract if one chooses to make the contract, suppress business and industrial conditions offensive to public welfare, curtail the area in which one may contract, and fix rates and prices.

But none of this comprehends power to compel one to contract. A cooperative hurts no one by serving only its members.

Even regulation if "it goes too far will be recognized as a taking" and a violation of due process. Holmes, J. in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 at 416. Yet here the statute goes beyond regulation. To leap this gap is a course fraught, we submit, with dangers to the American system.

The *German Alliance* case, supra, has often been cited (e.g., 11 *Am. Jur.*, p. 1059, Note 7) as showing the difference between the power to regulate and the power to compel service.* It has always been deemed elementary that

> "The fact that a business is affected with a public interest means that it may be regulated for the public good, but does not imply that it is under a duty to serve the public." (43 Am. Jur. 572, Public Utilities and Services, Sec. 2)

The fact that a business was "affected with a public interest" never sufficed to subject it to affirmative compulsion to serve or contract with anyone against its will, and the elevation of all business to the plane of those "affected with a public interest" has no such effect.

Thompson v. Consolidated Gas Co., 300 U.S. 55, in which this Court spoke through Mr. Justice Brandeis, was decided after *Nebbia*. The Texas Railroad Commission issued gas proration orders limiting the production of gas from the plaintiffs' wells, in order to compel "plaintiffs and others similarly situated to purchase gas from those well owners who have not provided themselves with a market and marketing facilities—well owners who under existing law are obliged to stop production, for want of a market, unless some marketing outlet is found" (p. 58). These others could not build pipe lines by reason of obvious financial difficulties (p. 61). Plaintiffs owned pipe lines but "none of the pipe lines here involved is a common carrier" (p. 60). The purpose of the orders was to reduce plaintiffs' production below

*The German Alliance decision was based on the fact that policyholders are at a disadvantage in bargaining with insurance companies and are in practice compelled to submit to charges "promulgated in schedules . . . which the applicant for insurance is powerless to oppose" (233 U.S. at 416). The opinion proceeds upon the theory that "the right to demand and receive service does not exist in the public" (p. 405), and sustains regulation of rates on the ground of inequality in bargaining power in a situation where the obligation to serve the public does not exist and where the insurance company is free to accept or reject risks.

capacity of their lines so as to create capacity for the others and "to compel complainants to afford markets to those having none" (p. 78).

The similarity of the case to the present is apparent, for here appellant is compelled to insure those who have no access to insurance otherwise. This Court held the Texas statute and the commission's orders to be violative of the due process clause of the Fourteenth Amendment and said (pp. 78, 79):

> "There is no suggestion that any of them is a common carrier of gas. . . .
>
> "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."*

*The *Thompson* case is also instructive by way of contrast to another class of cases. Since oil and gas are fugacious substances found in subterranean pools underlying a surface divided among the ownership of many, so that whatever is extracted by one is drawn away from the others, it is a rule of property law in oil and gas states that the surface owners have common or correlative rights in the gas and oil. Any one of them may be accountable to the others for extracting more than his fair share. If one alone were to extract these hydrocarbons without payment to the others, he would in effect be confiscating their interests in the common property. To avoid this confiscation, the others are compelled to engage in a race of extraction. The race may result in squandering a natural resource.

The state may prevent such waste, and, also, it may adjust the correlative and co-equal rights of the parties in the hydrocarbon-pool. In doing so it may require those who are able to extract the gas and oil, because they have access to a market, to buy a quota from the others. This does not compel purchase by one of another's property but is a mode of accounting for property taken, for if not taken in this manner it would be taken by being drained off subterraneously. The basis of this kind of regulation is (1) conservation of a natural resource and (2) adjustment of correlative rights and the protection of co-equal rights in a common property. See *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 579; opinions of Douglas, J. and Rutledge, J. in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 at 72 and 89; *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. ....., 95 L.Ed. 156.

In the *Thompson* case, supra, because of a geological anomaly the plaintiff's wells could not drain oil away from the others. Cf. *Republic Natural Gas Co. v. Oklahoma*, supra, at 97. To compel the plaintiffs to purchase from others would consequently not have been an adjustment of correlative rights in a common property, and the law was held unconstitutional as applied to plaintiffs.

As the *Thompson* case reminds us, there is, of course, a class of business in which a duty of compulsory service may be said to exist or may be imposed. We refer to public utilities. But it has always been held that to compel one not a public utility to enter into contracts against its will is a violation of due process. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 592; *Michigan Commission v. Duke*, 266 U.S. 570; *Smith v. Cahoon*, 283 U.S. 553, 563; *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 256; *Thompson v. Consolidated Gas Co.*, supra; *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228.*

Wyman, Public Service Corporations, comparing the power of the state over the public utility with its power over other business, epitomizes the matter thus (vol. 1, p. 32): ". . . the difference . . . is more than one of degrees; it is one of kind . . . . The law says to those in public business, you must do this for this applicant, and you must do it thus and so. To those in private business it says you must not do this, or if you do this you must do it thus and so."

In *Stephenson v. Binford*, 287 U.S. 251, the Court emphasized the distinction between the power to regulate and the power to compel service, and it recognized the line between public utility and non-public utility as the dividing line between the proper exercise of the two powers.

Oddly, the court below argues that in the *Stephenson* case this Court has changed the law (R. 184).† Yet subsequent to the

---

*Many other cases could be cited; e.g., *Allen v. Railroad Commission*, 179 Cal. 68, 88, 175 P. 466; that "it constitutes a taking of the same admits of no controversy," *Associated Pipe Line Co. v. Railroad Commission*, 176 Cal. 518, 528, 169 P. 62, approved in *Producers Transportation Co. v. Railroad Commission*, supra, at 230, 231; *Hollywood Chamber of Commerce v. Railroad Commission*, 192 Cal. 307, 310, 219 P. 983.

†Thus it says:

"The difficulty with appellant's argument, and with the Arizona case, is that they disregard or treat cavalierly, most of the relatively recent constitutional law cases dealing with the subject of the police power, and

Stephenson and *Nebbia* cases this Court in *Thompson v. Consolidated Gas Co.*, supra, cited with approval both the *Frost* and *Duke* cases.

What *Stephenson* holds is that one does not have to be a public utility in order to be subject to "regulation." Theretofore it had sometimes been supposed that a private carrier could not be regulated or subjected to any control by public service commissions. This view in part was the result of construction of statutes which made the fact of being a public utility the test of the commission's jurisdiction.

Stephenson held that private carriers are subject to regulation, but it expressly recognized that they are not subject to compulsory service. The issue was whether the state could regulate use of the highways by private motor carriers, require private carriers to obtain a permit from the public utility commission, and empower the commission to prescribe their rates. This Court said that there was no "attempt to convert private contract carriers by motor into common carriers." (p. 265)

> "Appellants, in support of their contention, rely upon prior decisions of this court; but there is nothing in any of them, as a brief review will disclose, which requires us to hold that the legislation here under review compels private contract carriers to assume the duties and obligations of common carriers, or interferes with their freedom to limit their business to that of carrying under private contracts as they have been wont to do." (p. 266)*

---

rely upon the earlier cases containing a very restricted viewpoint of the State's police power. Thus, many of the principles discussed in Frost v. Railroad Commission, 271 U.S. 583, and Michigan Commission v. Duke, 266 U.S. 570, relied upon by appellant, which cases held that a contract carrier could not be subjected to the burdens imposed on a public utility, were drastically modified as early as 1932 in Stephenson v. Binford, 287 U.S. 251."

*In *Morel v. Railroad Commission*, 11 Cal.2d 488, 497, 81 P.2d 144, the *Stephenson* case was referred to as recognizing the power to regulate private carriers so long as the state does not try to convert them into public carriers and lets them "choose their own patrons, and refuse to accept business as suits their convenience."

In *Champlin Refining Co. v. United States*, 329 U.S. 29, the Court construed a federal statute as granting power to the Interstate Commerce Commission to compel the owner and operator of a private pipe line to furnish information. In sustaining the statute it said (pp. 34, 35):

> "Appellant further contends that, as so construed, the Act exceeds the commerce power of Congress and violates the due process clause of the Fifth Amendment because, it is argued, this interpretation converts a private pipe line into a public utility and requires a private carrier to become a common carrier. But our conclusion rests on no such basis and affords no such implication. The power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier. This power has yet been invoked only to the extent of requiring Champlin to furnish certain information as to facilities being used in interstate marketing of its products. . . .
>
> "The contention that the statute as so construed violates the due process clause by imposing upon a private carrier the obligations of a conventional common carrier for hire is too premature and hypothetical to warrant consideration on this record. *The appellant in its entire period of operation has never been asked to carry the products of another and may never be. So far, the Commission has made no order which changes the appellant's obligations to any other company or person.* If it does, it will be timely to consider concrete requirements, and their specific effects on appellant." (pp. 34, 35)

Roig v. People of Puerto Rico, 147 F.2d 87 (1 Cir.) also recognizes the difference between regulation and compulsion to serve. It sustained a Puerto Rico act requiring sugar mills to obtain a franchise from the Public Service Commission, because

> "As construed by the court below, the Sugar Act does not convert all sugar mills into public service enterprises *and* force them to serve the public. It merely requires all sugar

> mills to submit to the Public Service Commission by taking out franchises. . . . The power of the Public Service Commission to force a mill to serve the public against its will, therefore, is not before us on this appeal." (pp. 89, 90) [Italics are the court's]

In *Fordham Bus Corporation v. United States,* 41 F. Supp. 712, a three-judge court, following and citing the *Stephenson* and *Nebbia* cases, held that one did not need to be a public utility to be subject to regulation, but said:

> "A *different problem* would arise if the statute necessarily required—or if the Commission were requesting—that plaintiff establish joint through routes or *undertake to serve all comers in respect of its charter operations.* Its solution would depend, however, not on any magic in plaintiff's denomination of itself as a 'contract carrier,' but on the more prosaic issue of *whether petitioner could constitutionally be required to alter so radically its type of operations.* As to that, we pass no judgment, since the question has not been presented."

The opinion below quotes a passage from *Lincoln Federal Labor Union v. Northwestern I. & M. Co.,* 335 U.S. 525, 536, that beginning with the *Nebbia* case the Court had "rejected the due process philosophy enunciated in the Adair-Coppage line of cases." That philosophy limited the power to regulate and enters not at all into our criticism of the statute here involved. Mr. Justice Holmes' dissent in the *Adair* case is now the accepted view. But let what he said be noted:

> "The section is, in substance, a very limited interference with the freedom to contract, no more. *It does not require the carriers to employ anyone.* It does not forbid them to refuse to employ anyone, for any reason they deem good . . ." *(Adair v. United States,* 208 U.S. 161, 191).

Mr. Justice Holmes' emphasis on the distinction between regulation and compulsion to deal was not accidental. He repeated it

in almost identical form in his dissent in the minimum wage case, *Adkins v. Children's Hospital*, 261 U.S. 525:

> *"This statute does not compel anybody to pay anything.* It simply forbids employment at rates below those fixed as the minimum requirement of health and right living" (p. 570).

These two statements would have been pointless except as emphasizing that the regulation was permissible because on the other side of the line from compulsion to serve. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 396, where the *Adkins* case was overruled and the dissent finally prevailed, this Court describes the statement just quoted as "pertinent."*

The fundamental error of the court below—its failure to distinguish between "regulation" and compulsion to contract—is brought into sharp focus by its description of *Hoopeston Canning*

---

*Mr. Justice Holmes' dissent in *Adair* found adoption in *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, and *National Labor Relations Board v. Jones & Laughlin*, 301 U.S. 1, which sustained orders prohibiting employment discrimination based on union affiliation. In *Jones & Laughlin* this Court said (p. 45):

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever . . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."

In *Phelps-Dodge Corp.* this Court said (p. 186):

> "He is as free to hire as he is to discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them.' It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization."

These cases are but another example of striking a balance between two rights when they conflict with each other, to which we referred in the footnote on page 28, supra. There is no such conflict in the present case.

Some reference was made in the arguments below to racial discrimination, although that subject is not involved in this case. The constitutionality of statutes prohibiting discrimination because of race, color or religion rests on a different basis and turns on a different set of considerations from any involved here. See, for example, the discussion in *Railway Mail Association v. Corsi*, 326 U.S. 88 at 98, and *James v. Marinship Corporation*, 25 Cal.2d 721 at 739, 740, 155 P.2d 329 at 339.

Co. v. Cullen, 318 U.S. 313, as "peculiarly applicable" (R. 189). The only resemblance between that case and this is the superficial one that *Hoopeston* involved a reciprocal insurance association. The Court held that reciprocals may be regulated. It did not so much as intimate that they may be compelled to insure others.*

We have mentioned every decision of this Court on which the court below relies except *Osborn v. Ozlin*, 310 U.S. 53. The Court there upheld a statute which prohibited insurance companies from making contracts of insurance on persons and property within the state except through residents agents. The statute was regulation. It did not compel the issuance of insurance. In its opinion this Court lists many things that states may do (pp. 65, 66). In *Nebbia v. New York*, 291 U.S. 502, at 526-529, appears an even more elaborate catalog. Doubtless these do not exhaust the field, but the striking fact is that every item on these lists is an example of regulation as we describe the term at p. 34, supra.

IV.

Even if the Rules Pertaining to Public Utilities Were Now to Be Extended to Insurance, the Statute Could Not Constitutionally Compel Appellant to Insure Non-Members, That Being Beyond the Scope of Its Dedication.

The business of insurance, of course, is not a public utility.

The court below would extend the rules applicable to public utilities to the insurance business. As we have seen, *Nebbia v. New York*, supra, was noteworthy because it eliminated the rubric "affected with a public interest" as the criterion of the power to

---

*In the *Hoopeston* case, in the interests of solvency of the insurer and the protection of its subscribers the state prohibited a reciprocal from entering into agreements with subscribers of limited assets. Here the statute seeks to compel subscribers of a reciprocal to enter into contracts with others whose responsibility is so bad that no one will insure them voluntarily! Two more different cases it would be difficult to imagine.

"regulate." It would be a still further step to eliminate the rubric "public utility" as a test of the power to compel contracts against one's will.

Neither in its holding nor in its reasoning did *Nebbia* take that step. But if it did, or if reason justifies the taking of that step now, still it would not answer the issue which appellant presents.

Taking that step could only justify going behind the name and label but not behind the basic reasons and substance of the principles expressed by the label. It would support going behind the name "utility," but would only mean that the principles now applied to utilities would be applied to all businesses or the insurance business.

It is essential to see just what those principles are. It will then be apparent that, even if commercial insurers for profit can be compelled to insure the public generally, and even if appellant can be compelled to insure any member of the Automobile Association that applies,* it cannot be compelled to insure nonmembers.

The substance of the public utility principle—its foundation—is that when one has in fact *voluntarily* offered to deal with the public generally, he may not discriminate *within the scope of his voluntary dedication or offer.* The law does not extend the scope of the party's offer. The rule is not truly one of compelling service. Rather, in its very essence, the rule is one against discrimination; it forbids discrimination within the range of one's voluntary holding out.

The test of a public utility is a fact—the fact of whom it has held itself out as ready to serve. It is the voluntary action of serving or offering to serve the public "generally" or "indifferently" which fixes the public status. It must be shown that one "undertakes generally and for all persons indifferently" to perform the service in which he is engaged.

---

*As stated at p. 7, supra, while appellant has never insured nonmembers, it often has rejected members.

These principles are too elementary to require elaboration. The cases are legion. E.g., *Motor Haulage Co. v. Malthie*, 293 N.Y. 338, 57 N.E.2d 41, 51; *Thayer v. California Development Board*, 164 Cal. 117, 127, 128 Pac. 21; *Forsyth v. San Joaquin Light, etc., Co.*, 208 Cal. 397, 404, 281 Pac. 620; *State v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36, 42. "This has long since been pointed out as ancient," Robinson, The Public Utility Concept, 41 Harv. Law. Rev., 276, at 203.*

Wyman on Public Service Corporations states:

> "It should be remembered, in justification of the imposition of the extraordinary law which requires those who are engaged in public callings to serve all that apply, that the service is voluntarily assumed." (Vol. 1, p. 167)

And again:

> "The fundamental characteristic of a public calling is indiscriminate dealing with the general public." (Vol. 1, pp. 197, 198)

It is equally elementary that if one has not in fact offered to do business with the public generally or indifferently, no law and no state constitution can constitutionally make him into a public utility. One becomes a public utility by fact not fiat. In *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, this Court said (p. 592):

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legisla-

*Advocating an extension of the public utility concept, Adler, "Business Jurisprudence," 28 Harv. L. Rev. 135, 156, 157, argued that anciently the status of the common carrier was not peculiar and that the calling of any man was a "common" one if "he solicit[ed] the favor of and undert[ook] to deal with persons *indifferently* for profit." (Italics are the author's.) The author purported to find stray vestiges of this supposed ancient conception as late as 1714. Assuming the ancient existence of this conception, it had disappeared as part of the change in the basic outlook marking the medieval from the modern. But assuming that it could now be revived (see pp. 28, 29, supra), the necessity of "undertaking to deal with persons *indifferently for profit*" would still remain.

tive command, is a rule not open to doubt and is not brought into question here."

Here, too, the cases are legion, extending to the present time. *Michigan Commission v. Duke*, 266 U.S. 570; *Smith v. Cahoon*, 283 U.S. 553 at 563; *Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207 at 210; *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228, 230, 231; *Texoma Natural Gas Co. v. Railroad Commission of Texas*, 59 F.2d 750 (3 judge court), approved in *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, at 79; *Motor Haulage Co. v. Maltbie*, supra; *Morel v. Railroad Commission*, 11 Cal.2d 488, 497, 81 P.2d 144.

Under the guise of regulation a state cannot require one to engage in a service that he was theretofore under no duty to perform. *Delaware, L. & W. R. R. Co. v. Morristown*, 276 U.S. 182, 195.

The same principles that forbid conversion of a private carrier into a common carrier or a private utility into a public utility also make it constitutionally improper to compel a public utility to serve beyond the limits to which its voluntary dedication or holding out has extended. What is the scope of a public utility's voluntary dedication has sometimes been debated, but it has never been doubted that its voluntary dedication marks the limits of its compulsory service.

Wyman, Public Service Corporations, states (Vol. 1, p. 219):

"Public profession not only establishes public obligation, but it largely determines the extent of the public duty. Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers. The primary question is, therefore, what their profession fairly covers; and this is again a question of fact rather than of law."*

*"To require a public utility to devote its property to a service which it has never professed to render or to the service of a territory which it has never undertaken to serve is tantamount to taking that property for public use without just compensation." 43 Am. Jur., Sec. 22, p. 588.

As said in *Northern Pacific Railroad Company v. North Dakota,* 236 U.S. 585, 595 (Hughes, J.), speaking of a common carrier:

> ". . . it must serve without unjust discrimination. . . .
>
> * * * * * * *
>
> "But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage."

The "authorities are unanimous in declaring that in dealing with public utilities, regulation of use within the dedicated use is as far as the police power may be extended. . . ." *Pacific Telephone & Telegraph Company v. Eshleman,* 166 Cal. 640 at 680; 137 Pac. 1119.*

SERVICE TO MEMBERS OF THE ASSOCIATION IS THE UTMOST LIMIT OF APPELLANT'S DEDICATION.

Suppose, then, that the concept of "public utility" were to be discarded as the criterion of compulsory service, and that the same power of compulsion were applied to insurance. The fundamental

---

*The court further said in that case (p. 699) and partially repeated in *Hollywood C. of C. v. Railroad Commission,* 192 Cal. 307, 311, 219 Pac. 983:

> ". . . it cannot be doubted that an order compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property. . . . Where the particular property has been dedicated to a public use; where the property, in other words, is employed in a public service, the owner has consented that the public may use his property within the limits to which the dedication extends. . . . But the fact

rule that one cannot be compelled to serve beyond the limits of his voluntary dedication would still remain.

In that event, it might conceivably be said of insurers engaged in business for profit, that they have already offered to do business with the public generally, that they are "common insurers," and therefore that the law can require them to serve within the full ambit of that offer.

That argument, however sound,* could have no relation to appellant. The scope of *its* activities, the extent of *its* offer, the ambit of *its* dedication since its inception have been to serve only members of the State Automobile Association. *That basic fact is a finding of fact on which the case comes to this Court.* For convenience we requote the finding:

> "That petitioner was formed and organized in the year 1914, solely for the purpose of making insurance available to, and has in practice limited its insurance coverage to 'Members of the California State Automobile Association or corporations or firms in which such members are officers or partners,' and has at all times thereafter existed solely for that purpose, and it has continued this practice in force . . . From its inception it has at all times been and it is petitioner's basic policy that only members in good standing of the California State Automobile Association or corporations

---

that property has been offered for one public use does not authorize the public to use it for other and different purposes. The purveyor of a public service—whether that of a carrier or an innkeeper, a light or power company, a telephone or a telegraph company, is not bound to undertake a service different from that which he has professed to render (Wyman on Public Service Corporations, sec. 251)."

*Rationally, no insurer has ever held himself out as ready to insure the public indifferently or generally. In the case of carriers and other utilities, one man's goods to be carried are much like another's, and the same thing is true of all of the public callings. But insurance is a very different matter. One man's insurance risk is not like another's. To extend the category of the public callings to a business like insurance involves a burden upon insurers which differs both in kind and degree from a similar extension in other lines of business. The insurer faces the same kind of problem as the banker when an applicant seeks a loan. Each risk is unique; and the factors are highly subjective.

or firms in which such members are officers or partners shall be eligible to apply for insurance in petitioner." (R. 43, 44)

The appellant does not propose and has never proposed to issue insurance to the general public. The very charter which gave it existence restricted its insurance service to a certain group.

This fact distinguishes appellant not only from corporate insurers for profit but also from reciprocals that have been open to all.

To compel appellant to insure non-members is, in the language of *Fordham Bus Corporation v. United States,* 41 F. Supp. 712 (3 judge court), to compel it to alter radically its type of operations. And, as said in that case, that is a different problem from subjecting it to regulation. We submit that the state cannot constitutionally impose on appellant any such burden, whatever it may do to commercial insurers for profit dealing with the public generally.

These principles have been basic: No one can be made a public utility by legislative fiat; the test of whether one is a public utility is the fact of his voluntary holding out, his voluntary dedication; and one may not be compelled to serve beyond his voluntary dedication.

Upon these principles the law of public utilities and the entire structure of control has been erected. If the decision of the court below is affirmed, the foundation and structure is swept away as so much useless rubble, for the power of control will have a new basis of justification, without limit or confine.

THE SCOPE OF ONE'S DEDICATION IS MEASURED BY WHAT IT HAS DONE IN FACT.

The court below would avoid the principle that one may not constitutionally be compelled to serve beyond its dedication by substituting a legal fiction for the facts. It asserts (R. 193):

"... If appellant has 'dedicated' its business to the public service, it has dedicated it to the writing of automobile liability insurance. The extent of its 'dedication' cannot be

> measured by its past customs or practices, but must be measured by the extent of its powers under the law. While appellant has heretofore only insured a select group, that does not mean that appellant has 'dedicated' its business to that group. Under the law (Ins. Code, § 108) this company has the legal right to write automobile liability insurance on a statewide basis and for all applicants. That is the real extent of its 'dedication'."

This escape from the facts is an attempt to dissolve fundamental principles by mere verbal expression. It is fallacious both in law and in fact.

It is fallacious in law because the extent of one's dedication is not a question of law, but of fact. For example, a corporation's charter may empower it to carry for the public generally; yet if in fact it has never offered to do so and has not done so, it cannot be compelled to do so. The extent of its dedication is measured by what it has done, not by what it would have had power under the law to do had it so chosen.

As Mr. Justice Holmes has said (*Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 254), "the important thing is what it does, not what its charter says."

In 14 *Fletcher's Cyc. Corporations* (Perm. Ed., 1945 Rev. volume) p. 82, Section 6692, it is said:

> "However, the actual business conducted by the corporation, rather than the authority conferred by its charter, controls the determination whether a corporation is a public utility. The fact that its articles of incorporation empower a corporation to engage in public service does not, of itself, show that it is engaged in public service, and the real test would appear to be not what a corporate charter may say but rather and only what the corporation is in fact doing."

To the same effect see *De Pauw University v. Public Service Commission of Oregon*, 253 Fed. 848; *Del Mar Water L. & P. Co. v. Eshleman*, 167 Cal. 666, 673, 140 Pac. 591; *Southern California Edison Co. v. Railroad Commission*, 194 Cal. 757,

at 763, 230 Pac. 661; *Interstate Commerce Commission v. Oregon Washington R. Co.* 288 U.S. 14, 43; *State v. Public Service Commission,* 275 Mo. 483, 205 S.W. 36, 39.*

Patently, this must be so. If a corporation's "charter" conferred on it every power, its powers would be no greater than those of a natural person. Yet no one would say that natural persons have dedicated themselves to the public generally.

Appellant is not a corporation but a collection of natural persons and, *a fortiori,* even if its "charter" permitted it to insure the public generally, it has not thereby dedicated itself to do so, for it has never done so in fact.

But in fact appellant has no "charter" authorizing it to insure the public. In stating that appellant has a legal right to write liability insurance for all applicants, the court below says no more than that California law permits reciprocals to be formed to insure anyone. But the extent of a particular reciprocal's powers is not measured by the extent to which the state law would permit a reciprocal to go, if it wished to go that far. The measure is the power of attorney which each participant gives to a common attorney in fact to represent him in the exchange of their insurance contracts. If a reciprocal can be said to have a "charter," it is this power of attorney.

In Appendix II to this brief we set out the statutory provisions about reciprocals (Insurance Code, Sections 1300, et seq.). They provide that any persons, called subscribers, may exchange contracts with each other insuring against any loss; that the organiza-

---

*As said in the *De Pauw* case (pp. 849-50) supra:

". . . the plaintiff . . . merely undertook to furnish water in fulfillment of a private contract with certain individuals selected by them, and not to the public generally, and therefore were not public utilities. . . .

"The fact that under their articles of incorporation the several companies might have engaged in the business of a public utility does not ipso facto make them so. The chartered authority did not mark the nature of the operating companies. It is merely a naked authority to do business, but until it is pursued in a certain way it did not make the companies public utilities."

tion under which the subscribers exchange contracts is termed a reciprocal or interinsurance exchange; that the contracts may be executed by an attorney in fact acting under powers of attorney, the form of which must be filed with the Insurance Commissioner; that "the power of attorney and contracts made thereunder may: . . . (b) *Impose such restrictions upon the exercise of the power as are agreed upon by the subscribers*" (Sec. 1307); and that the reciprocal must be operated in "conformity with the subscribers' agreement and power of attorney" (Sec. 1308).

As we have seen (pp. 7, 8, supra), since its inception in 1914 appellant's power of attorney has provided that "Only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the Bureau."

By signing that power each subscriber agrees to be bound for the losses of others, provided they are members of the Automobile Association and not otherwise. To subject appellant to the statute compels it to rewrite the terms of its existence and to change its basic charter.

The suggestion of the court below that because appellant has written automobile liability insurance it has dedicated itself to the writing of automobile liability insurance generally is a non-sequitur. Under this reasoning there never could be a private carrier, for by carrying for any group, however limited, a carrier would be dedicating himself to carry for all generally.*

---

*Insurance Code, Sec. 108, cited in the passage quoted from the court's opinion above merely defines "liability insurance." It reads:

"Liability insurance includes:

"(a) Insurance against loss resulting from liability for injury, fatal or nonfatal, suffered by any natural person, or resulting from liability for damage to property, or property interests of others but does not include workmen's compensation, common carrier liability, boiler and machinery, or team and vehicle insurance;

"(b) With respect to operations or property covered by a policy of liability insurance as defined in subdivision (a), insurance of

A COOPERATIVE MAY NOT BE COMPELLED TO SERVE NON-MEMBERS.

Since appellant is a cooperative group banding together in reciprocal self interest, it is pertinent to note that the rule that one cannot constitutionally be converted by legislative command into a public utility has been applied with particular solicitude to cooperatives.

In *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, the carrier who was held not to be a public utility was engaged in carrying for members of a cooperative. In its opinion in that case this Court cited approvingly *Hissem v. Guran*, 112 Ohio St. 59, 146 N.E. 808, and *State v. Nelson*, 65 Utah 457, 238 Pac. 237.

Hissem v. Guran held that a carrier engaged in the business of carrying for the members of a cooperative was not a public utility and could not be converted into one. It had not dedicated itself to serving the public *indifferently* but was confining itself to the members of the cooperative.

Relying on *Hissem v. Guran* is *Dairymen's Cooperative Sales Assn. v. Public Service Commission*, 318 Pa. 381, 177 A. 770. There a trucker entered into contracts with the cooperative and its 17,000 members to haul their milk products. The Commission contended that hauling for such a large number of persons made the trucker a common carrier. Applying the usual test of a common carrier—"undertaking to carry the goods of all persons indifferently"—the court held otherwise.

It emphasized as the essential quality of a cooperative the relationship between him who supplies the service and him who receives it as not that of buying and selling between strangers

---

medical, hospital, surgical and funeral loss or expense of the insured or other persons injured, irrespective of legal liability of the insured, when issued with or supplemental to the insurance defined in subdivision (a);

(c) The provisions of this code relating to disability insurance do not apply to insurance defined in subdivision (a)."

but rather of mutual cooperation to a common end. These remarks fit appellant.*

The other case cited by this Court, *State v. Nelson,* was relied on in *Garkane Power Company v. Public Service Commission* (1940), 100 Pac. 2d 571, 98 Utah 466, a well-reasoned opinion containing a review of the authorities. The court held that Garkane Power Co. was not a public utility:

> "The record shows that Garkane was incorporated for the purpose of generating or acquiring electric energy to distribute and sell to its *members only.* The Corporation is non-profit, and any excess money collected is to be returned or credited to the member consumers pro rata on the basis of the amount of electrical energy consumed during the period in which the excess was collected . . ." [Italics are the court's] (p. 572)

Speaking of the distinction approved by this Court that one is not a public utility "where the business or operation is not open to an indefinite public," the court said (p. 572):

> "The distinction there made is valid, and is conclusive of this case. Garkane does not propose to hold itself out to serve all who apply and live near its lines; its very charter which gives it existence restricts its service to a certain group (members). *It does not propose to serve 'the public generally,' but only to serve its members.*"

So here: Appellant does not propose and never has proposed to issue insurance to the general public. The very charter which gave it existence restricts its insurance service to a certain group, namely, members of the California Automobile Association.

The court further pointed out:

---

*In *Mitchell v. Pacific Greyhound Lines,* 33 C.A.2d 53, 91 P.2d 176, the California court, speaking of insurance reciprocals, said (p. 60): "The plan appears to be designed for those who desire to assume the positions of both the insurer and insured with a view to eliminating that part of the ordinary insurance premium which goes into profit."

> "The distinction between a public service corporation and a cooperative is a qualitative one. In a cooperative the principle of mutuality of ownership among all users is substituted for the conflicting interests that dominate the owner vendor-non owner vendee relationship. In a cooperative all sell to each." (p. 573)

Both the *Dairymen's* case and the *Garkane* case were decided after *Nebbia v. New York*, 291 U.S. 502.

The consensus of the cases is summarized in an annotation in 132 A.L.R. 1495, 1498:

> "If it confines its service to its own stockholders or to members of its own group and does not hold itself out as willing to serve the public, it is not ordinarily considered as a public utility."

And see annotation, 98 A.L.R. 226.

THE WIDE SCOPE OF CONTROL OVER CORPORATIONS IS NO MEASURE OF A STATE'S POWER OVER OTHERS.

The power of the state to impose compulsory service on corporate insurers may involve different considerations than the power to impose compulsion on appellant.

The wide scope of control over corporations is no measure of a state's power over others. It has even been doubted whether corporations can claim the protection of the due process clause of the Fourteenth Amendment (see Douglas, J., in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 at 576). While that position has not received the approval of the Court, it is settled that corporations can claim no equality with individuals in the enjoyment of rights. *United States v. Morton Salt Co.*, 338 U.S. 632 at 652. As stated in *Waters-Pierce Oil Company v. Texas*, 177 U.S. 28 at 43, the powers and rights of corporations

> "cannot find an answer in the rights of natural persons . . . A corporation is the creature of the law . . . the State prescribes the purposes of a corporation and the means of exe-

cuting those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations."

See also *New York Life Ins. Company v. Cravens*, 178 U.S. 389; *Packard v. Banton*, 264 U.S. 140; *Washington v. Superior Court*, 289 U.S. 361, 365.*

V.

The Statute Cannot Be Sustained on the Theory That It Does Not Compel Appellant to Insure Non-Members but Merely Terminates Its Right to Do Business if It Declines. The Doctrine of Unconstitutional Conditions Precludes That Theory.

The court below finally admits that appellant cannot be compelled to assume unwanted risks, but it indulges in a fiction to deny that the statute has that effect. It states (R. 193):

"*No company can be compelled to assume a risk.* But if it refuses to accept an assigned risk, its right to do business in this state may be terminated."

This is the highwayman's order, "Your money or your life."

In *Union Pacific Railroad Company v. Commission*, 248 U.S. 67 at 70, the Court, through Mr. Justice Holmes, said:

". . . as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary. . . ."

It refused to countenance an order predicated upon such illusory power of choice.

A lawful power of a state—even the power to grant or deny a privilege—cannot be exercised as an instrument to accomplish an unconstitutional result. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593.

---

*Cf. Mr. Justice Brandeis in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 at 406: "The difference between a business carried on in corporate form and the same business carried on by natural persons is, of course, a real and important one."

In the case just cited, the California Supreme Court, while conceding that the State could not convert a private utility into a public utility, held that the State had the power to grant or withhold from its citizens the privilege of using the highways, and having such power, could grant the privilege for private gain on "condition that [the citizen] dedicate the property used by [him] in such business to the public use of public transporation" (p. 237).

This Court reversed. Conceding that the right to use the highways was merely a privilege which the State could grant or deny, it held that the State could not use its power to accomplish an unlawful purpose; it could not use it to require a private carrier to become a public carrier. It said (p. 593):

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. *It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.*"

This principle was applied and the *Frost* case cited in *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 634, a unanimous decision.

Earlier, in several opinions written by Mr. Justice Holmes, the same principle had been applied. Thus in *Fidelity & Deposit Co. v. Tafoya,* 270 U.S. 426, 434, an insurance corporation was held entitled to an injunction restraining a state corporation commissioner from suspending its right to do business. The Court said:

> ". . . we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. . . . Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court . . . or to tax it upon property that by established principles the State has no power to tax . . . or to interfere with interstate commerce. . . ."

In *Western Union Telegraph Co. v. Foster,* 247 U.S. 105, reversing the Supreme Judicial Court of Massachusetts, the Court (by Mr. Justice Holmes) said (p. 114):

> ". . . It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end . . . and a constitutional power cannot be used by way of condition to attain an unconstitutional result . . . It cannot be justified under that somewhat ambiguous term of police powers."

What may not be done directly may not be done indirectly. In *Texoma Natural Gas Co. v. Railroad Commission of Texas,* 59 F.2d 750, a three judge court had declared unconstitutional the Texas "Common Purchaser Act," which commanded pipe-line carriers of gas to buy gas from others having no access to the market. A later act sought the same result by limiting the amount of his own gas that a producer could ship through his own pipe

lines. As noted at pp. 35, 36, supra, this Court held the statute unconstitutional (*Thompson v. Consolidated Gas Co.*, 300 U.S. 55), pointing out that the effect of the two statutes on the pipe line owners was the same (p. 79):

> "There is a difference in the means employed; but the difference is not of legal significance. The 1931 Act attempted to compel the purchase by frankly commanding it, under sanctions criminal and civil. The 1935 Act operates by indirection. Its command is no less compelling; its penalties not significantly different."

"If the avowed purpose or self-evident operation of a statute is to . . . make up for its inability to reach [a result] directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good." *Miller v. Milwaukee*, 272 U.S. 713, 715 (per Holmes, J.). The inquiry must be whether federal constitutional rights have been denied in substance and effect. *Oyama v. California*, 332 U.S. 633 at 636.

In recent years the principle of unconstitutional conditions has been applied for the protection of civil rights. *Hague v. C.I.O.*, 307 U.S. 496 at 515; *Thomas v. Collins*, 323 U.S. 516 at 54[illegible]; *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 Pac.2d 885.*

---

*In the *Danskin* case a School Board granted the use of a public school building on condition that the applicant take an oath that he did not advocate and was not affiliated with any organization advocating the overthrow of the government by force or violence. The Court said (p. 545):

> ". . . A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. (*Frost v. Railroad Commission of California*, 271 U.S. 583, 594 [46 S.Ct. 605, 70 L.Ed. 1101]; *Hague v. CIO*, 307 U.S. 496, 515 [59 S.Ct. 954, 83 L.Ed. 1423]; *Murdock v. Pennsylvania*, 319 U.S. 105, 110-111 [63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81]; see the brief of the Bill of Rights Committee of the American Bar Association filed in *Hague v. CIO, supra*, reprinted in 25 American Bar Association Journal, 7, 8, 74.)
>
> "Since the state cannot compel 'subversive elements' directly to

In *Hannegan v. Esquire*, 327 U.S. 146, the Court said:

> "But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever."

APPELLANT'S RIGHT TO DO BUSINESS IS NOT A PRIVILEGE DERIVED FROM THE STATE.

The foregoing cases limit a state's power to deny a privilege. *A fortiori*, they apply here. Not being a corporation, appellant does not draw its existence from the state. Its right to do business is not a privilege derived from the state. As a reciprocal it is simply an aggregate of private contracts among persons desiring to provide themselves with cooperative insurance by agreeing, among themselves, to share losses which any member of the group may suffer. The right so to contract with each other was not the creature of statute, and reciprocals existed before adoption of any of the statutes dealing with them.

As said *In re Minnesota Insurance Underwriters*, 36 F.2d 371:

> "Certain groups of individuals had found this plan an economical and practical method of providing indemnity. One man might not be sufficiently strong financially to bear the risk of loss alone, but he and a number of his friends and acquaintances or others engaged in the same line of business could form a group or association abundantly able to act as their own insurers, and thus procure insurance at or near its actual cost. This scheme of insurance was peculiarly attractive to those owning what are generally known in the insurance world as 'perferred risks,' where the danger of loss is small." (P. 372)

---

renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. Such a condition is as unconstitutional as the condition that a foreign corporation pay a tax for the privilege of doing business that could not otherwise be constitutionally imposed on it . . . or agree to abstain from resort to the federal courts . . . or the condition that a public carrier obtain a certificate of public convenience and necessity before using the public roads. (*Frost v. Railroad Commission of California*, supra, 271 U.S. 583.)"

See also discussion by the Honorable Justin Miller, formerly of the Court of Appeals of the District of Columbia in 9 F.R.D. 217 at 233.

A reciprocal's right to do business is thus unlike the privilege to use publicly built highways in the *Frost* case. The business is in no way "dependent upon public grants or franchises for the privilege of conducting [its] activities." *Nebbia v. New York*, 291 U.S. 502 at 531.

Of course, the right to engage in insurance as a reciprocal may be regulated. It may be limited. If the state should conclude that it is an unwise method of insurance and against public policy, possibly it might even forbid individuals from contracting with each other to bear each other's losses, and confine insurance to corporations. Many activities in which natural persons engage and have a right to engage without necessity of statutory authority may be forbidden by statute.

But California has expressed no public policy against reciprocals. It has found no evil in that method of operation, and it has not seen fit to prohibit it. What the Assigned Risk Law does to appellant is to threaten to deprive private individuals of the right to engage in cooperative self help in order to coerce them into succumbing to what would be an unconstitutional imposition if done directly. *The deprivation is here a penalty for refusal to succumb and not the exposition of a public policy.*

Osborn v. Ozlin, 310 U.S. 53, relied on by the court below and discussed at p. 42, supra, may be noted again. The statute there did not compel the issuance of insurance, and the prohibition involved was not an instrument to compel what the state could not directly command. As this Court said (pp. 65, 66):

> "The present case, therefore, is wholly unlike those instances in which a 'so-called right is used as part of a scheme to accomplish a forbidden result.' *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 434. For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests."

VI.

No Decided Case Sustains the Legislation Here Assailed

We have said (p. 32, supra) that the decided cases which directly involved the power of a State to compel an insurer to contract with unwanted risks support appellant, and that there are none to the contrary.

The court below cites a Massachusetts opinion and certain Texas cases.

The former, *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681, was not a decision in a controverted case but was merely an advisory opinion to the legislature. Advisory opinions are not precedents. They arise outside of any factual controversy and are given without benefit of argument by counsel.* For example, the opinion does not even mention the leading case, *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71 (discussed p. 32, supra), which may not have been called to the court's attention.

Even apart from this fact, the opinion is neither in point nor persuasive. The court was careful to restrict its approval of the statute to the narrow basis that the insurers there were *corporations* whose charters might be altered, amended or revoked at any time, at the pleasure of the state. Under the Massachusetts Constitution every corporate charter issued since 1831 has been subject to the reserved power of the state to change or alter the corporate rights and duties. Only because of this reserved power was the proposed legislation approved.

Thus the court said:

> "The proposed act is confined in its scope to motor vehicle liability policies and bonds obligating corporations

*For these reasons the Massachusetts courts have repeatedly said that if a controversy does arise involving the constitutionality of a statute, the court will sedulously guard itself against any influence of an advisory opinion previously given by it; *Green v. The Commonwealth*, 12 Allen 155, 164; *Building Inspector of Lowell v. Stoklosa*, 250 Mass. 52, 145 N.E. 262; *Mayor of Lynn v. Commissioner of Civil Service*, 269 Mass. 410, 169 N.E. 502.

. . . If in the original charters of such corporations the substance of sections 3 and 4 of the proposed act had been inserted, they would have been made the conditions upon which the corporations came into existence and accepted their franchises. A corporation can raise no questions as to the constitutionality of a proceeding in accordance with the charter which it was content to accept. Having consented to come into being subject to these limitations, it could not be heard to complain of them. . . . Every charter of a corporation granted since March 11, 1831, is subject to amendment or alteration, and every corporation organized under General Laws is subject to such laws as may hereafter be passed affecting or altering its rights or duties. G. L. c. 155, § 3. All insurance or surety corporations established since 1831 took their corporate existence subject to these provisions of law and cannot complain of their exercise. . . ." (147 N.E. at 700)

". . . It follows that a statute such as that here proposed, as to the board of appeal and its powers, would be valid *in the main* in its effect on existing domestic insurance corporations or such as may be hereafter organized. . . .

"That which a state may do with corporations of its own creation, it may do with foreign corporations admitted to do business within its borders as a condition of their continuance of business, provided in other respects no constitutional obstacle is encountered." (701)*

A subsequent decision, *Factory Mut. Liability Ins. Co. v. Justices of S. Court*, 300 Mass. 513, 16 N.E.2d 38, shows that the court was thinking not only of corporations but of the fact that they are engaged in the business for profit.†

We have seen (at p. 54, supra) that a state's power over corporations is no measure of its power over others.

---

*The very broad effect of this Massachusetts constitutional reservation of power over corporations was long ago noted in *Greenwood v. Freight Co.*, 105 U.S. 13, at 17.

†". . . no company attempting to engage in this business can . . . limit its operations to that part of the field in which there is the least risk and the most profit." (16 N.E.2d 38, at 40)

Nothing in the reasoning of the Massachusetts court lends support to the application of the Assigned Risk Law to appellant so as to compel it to insure non-members of the Association. Mr. Justice Frankfurter (then Professor Frankfurter) has pointed out in "A Note on Advisory Opinions," 37 Harvard Law Review 1002, that advisory opinions are particularly deplorable in constitutional controversies. "The stuff of these contests are facts, and judgment upon facts." That is as sound a criticism of opinions sustaining legislation as of opinions striking it down. The abstract discussion in the Massachusetts opinion has no relation to the unique facts of the present case that appellant is not a corporation, but a cooperative aggregate of individuals, that it was "formed . . . solely for the purpose of making insurance available" to members of the Association, "has at all times thereafter existed solely for that purpose" and has in practice consistently so limited itself (see pp. 6-8, supra).

The particular issue involved here has never been raised in Massachusetts in *any* case, and the issue discussed in the advisory opinion has never been raised there in any *controverted* case. In the other Massachusetts case cited by the court below, *Factory Mutual Liability etc. Co. v. Justices*, supra, the insurer was a foreign corporation which had come into the state and been licensed to do business after the enactment of the compulsory insurance law. The constitutional question was not raised.

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511; *R. Simpson & Co. v. Commissioner*, 321 U.S. 225.*

*Appellee has cited *Ex Parte Poresky*, 290 U.S. 30, as sustaining the constitutionality of the Massachusetts statute. That case involved only the provision of the statute requiring automobile drivers to obtain insurance as a condition to being permitted to drive. That is an entirely different question.

Even though the Massachusetts court restricted its opinion to corporations, it confessed that the statute "constitutes serious limitations upon customary methods of conducting the insurance business," "a great interference with freedom of contract" and went "to the verge of power" (147 N.E. at 701). For that reason later, in *Neustadt v. Employers Liability Assurance Corporation*, 303 Mass. 321, 21 N.E.2d 538, the court declined to construe the statute so as to extend to brokers the right to compel issuance of insurance.

Moreover, later decisions of this Court discredit the reasoning of the Massachusetts advisory opinion, even as applied to corporations. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, applying the doctrine of unconstitutional conditions, was decided a year afterwards. Nine years later, in *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 634, this Court, referring to *Frost*, made it clear that a state

> "might have denied to foreign corporations admission to the State. But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution."

In *Coombes v. Getz*, 285 U.S. 434, six years after the Massachusetts opinion, this Court reversed the Supreme Court of California which, in sustaining the constitutionality of a statute repealing an existing stockholder's liability, grounded its decision upon a provision of the California Constitution similar to that of the Massachusetts Constitution upon which the opinion of the Massachusetts judges was placed.

In *Employers Liability Assurance Corp. v. Frost*, 48 Ariz. 402, 62 P.2d 320, the Arizona court took heed of *Frost Trucking Co. v. Railroad Commission*, supra, and, in holding unconstitutional a law compelling a corporate insurer to grant insurance, said:

> "The state, if it so chooses, may prohibit a foreign insurance company from entering the state, but, if it permits it to enter, it must not impose conditions which require such in-

surance company to relinquish any of its constitutional rights." (p. 323)

The Texas cases referred to by the court below are decisions of intermediate courts. In none of them was the constitutional question presented, argued, or discussed. The first case, *Texas Employers Insurance Association v. United States Torpedo Company*, 8 S.W.2d 266 (Tex. Civ. App.), involved a public body created as a state agency for the purpose of issuing workmen's compensation insurance to any applicant. It did not involve the rights of any private insurer. The basis of the affirmance, 26 S.W.2d 1057 (Tex. Comm. App.), was that "the association had been created for the sole purpose of carrying out the provisions of this law." (p. 1058). In the course of the opinion, it was remarked that "we are unwilling to give assent to the assumption that a private insurance company" had different rights than the public agency (p. 1059). But this was pure dictum, for no private company was involved.

The later Texas cases merely repeat the dictum.

Even the dictum is not in point because the court was speaking only of corporations, and it was speaking of workmen's compensation insurance, which, unlike other kinds of insurance, is a creature of statute. The very statute that gave birth to that kind of insurance specified, at the moment of its birth, who might issue such policies and that if any corporation wished to write this newly-created type of insurance it should be prepared to do so for everyone. (See 26 S.W.2d at 1059.)

In *Employers Liability Assurance Corporation v. Frost*, supra, the court stated that while courts had gone far in upholding the right of a state to regulate and control the insurance business,

> "we have found no case *where the facts*, as here, *call for a decision* on the power of the Legislature to make it mandatory upon an insurance company . . . to insure all risks. . . ." 62 P.2d 320 at 324.

This observation is precisely correct.

VII.

Public Policy Does Not Permit the State to Impose on Private Parties the Burden of Effectuating Public Ends

Much is said by the court below about "public policy." It is said that with the growth of highway traffic there has been an increase of automobile accidents and large losses to injured persons at the hands of those who are uninsured and unable to respond in damages. This problem, it is said, has led many states to require licensing of drivers and either compulsory insurance or proof of financial responsibility as a condition to issuing of licenses (R. 173). We are then told that these requirements have made it necessary that insurance be made available to those who want it.*

Public interest certainly warrants keeping law breakers and reckless drivers off the highways or doing so unless they are insured. But it is a dubious step to say that the public interest therefore requires that insurance be made available to bad risks and bad drivers. It would seem that the way to protect the public from bad drivers is to prevent them from driving rather than to make it possible for them to continue to drive.†

---

*California has a Financial Responsibility Law (Vehicle Code, Sec. 419-420.9), but it was enacted July 8, 1947, *after* the enactment of the Assigned Risk Law. The latter was enacted February 17, 1947, effective immediately, and was amended June 30, 1947. Appellee argued below, anachronistically, that the Assigned Risk Law was necessitated by the Financial Responsibility Law. The court below does not make this error and does not connect the two statutes but refers to earlier and less sweeping legislation.

Moreover, as stated in a review of this case in "Survey of California Law", 1949-1950 (College of Law, University of Santa Clara) at p. 108, "the California Financial Responsibility Law is not a compulsory insurance law."

†Throughout the country not a few insurance executives have been raising that cry. *Best's Insurance News*, January 1948, contains an address before the Massachusetts Association of Insurance Agents by Mr. John A. Diemand, President, Insurance Company of North America, in which he stated (p. 96):

> "It is one thing to say: 'All who drive must be financially responsible.' It is quite another to add to this 'and all have a right

The question whether public policy requires that insurance be made available to all who wish it may be for the legislature to decide. But if the legislature is free to decide what constitutes public policy, the Fourteenth Amendment does not leave it wholly free in deciding how the policy is to be fulfilled.

The legislature cannot, we submit, fulfill this public policy at private cost.

If insurance should be made available, it might be appropriate for the State, through a state fund, to make it so. It is one thing

---

to become financially responsible through insurance.' Yet practice has shown an increasing tendency on the part of administrative officials, through use of the technique of assigned risks, to come quite close to making this amendment. . . . Do you imagine that if all of these risks were sound from an underwriting standpoint there would be any necessity for their assignment? . . .

"I think you will find that at least a partial and very plausible explanation for the desire of casualty insurers to withdraw from compulsory automobile writing lies in the tendency of automobile licensing officials to overlook fitness as a driver in favor of financial responsibility gotten through a forced assumption of risk by insurers. That there is a countrywide official attitude of indifference to driving competence is borne out by the facts recited in the Saturday Evening Post article entitled 'License to Kill.' It is not a proper function of the business of insurance to shoulder the cost of preserving substandard social conduct; and the members of that business should not be compelled to perform such disservice to the public.

"The state cannot salve its conscience by providing for payments in the event of loss of life or injury to third parties. Its efforts should be directed toward prohibiting the known careless and indifferent automobile operator from having access to any type of motor vehicle at any time."

The same issue contains the presidential address before the National Association of Independent Insurers by Mr. Adlai H. Rust, in which he said (p. 33):

"The problem of the proper administration of an Assigned Risk Plan under present day conditions has engaged the attention of and been of concern to many companies upon several occasions during this past year. There is considerable foundation for feeling that some of the problems in that field that exist today are occasioned by

"(1) A general reluctance to recognize the fact that there are thousands of individuals granted a license to drive an automobile that are unfit to enjoy that privilege.

* * * * * * *

"(3) An inclination to pass the whole burden of this problem on to the insurance carriers, rather than for the various

to say that reckless drivers may freely drive the highways, imperiling the lives and property of the public, not at their own risk and expense but at the risk and expense of the public. It is quite another to say that they may do so at the risk and expense of private parties. And whatever may be said about placing the expense on commercial insurers organized for profit, it is still more extreme to impose that expense on a group of careful drivers cooperating to insure themselves and thus to keep down the cost of their own insurance.

To argue that the state may validly give relief to one group by compelling another to bear its burdens is to embrace totalitarian notions—no matter by what high sounding phrases it is glossed over—and it becomes necessary to let perceptive minds like Mr. Justice Holmes remind us, as he did in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416:

"We are in danger of forgetting that a strong public desire

---

states to do the things that are really necessary to remove the many unfit drivers from our highways."

In *Best's Insurance News*, March 1948, Mr. Ray J. Mills, President of the Iowa Mutual Liability Insurance Co., is reported as saying (p. 31):

"So by inference, the governor tells the insurance industry that they must furnish insurance to incompetent, reckless and drunken drivers. But I say to the governor that providing insurance for reckless and drunken drivers won't keep them from killing and crippling the citizens of his own and other states and it won't lower the rates which safety minded drivers must pay. . . .

"What's the answer? Obviously it is strict enforcement of driver's license and safety responsibility laws. . . . Agents are in a position to influence public opinion to the end that incompetent and drunken drivers will be kept off the road. That is the primary purpose of safety responsibility laws. If one of these drivers asks for insurance, tell him why he is not eligible for it, instead of trying to get some company to issue a policy for him. Talk to policyholders about their driving habits, let them know that they, as a part of the public make their own rates and finally get them to talking about removing unsafe drivers from the roads instead of demanding that some company or the state provide insurance for them."

To the same effect, *Pacific Insurance Magazine*, November 1948, p. 32, reporting Harold B. Jackson, President of Banker's Indemnity and Chairman of the National Committee for Traffic Safety, in an address at the annual meeting of the American Motor Vehicle Administrators, assailing assigned risk plans.

to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Justice Holmes also warned against the "natural tendency of human nature" to extend too far the immunity of the police power from the Fourteenth Amendment (p. 415):

". . . The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amedment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule, at least, is that while property may be *regulated* to a certain extent, if regulation goes too far it will be recognized as a taking."

If this is so of "regulation that goes too far"—in the *Mahon* case a prohibition of a particular kind of use—what of legislation that leaps beyond regulation to the wholly different species, compulsion to contract, to associate with unwanted partners, to assume others' liabilities?

Public policy must be fulfilled at public cost. If the affirmative act of an individual creates a problem, the cost of its removal may possibly be imposed on him. Otherwise not. Thus the cost of eliminating grade crossings may be imposed on the railroad whose traffic creates the risks to be eliminated. But it may not be so imposed where the purpose is to facilitate construction of high-speed highways, to aid unemployment, improve national defense, or make new modes of transportation available to the public. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 417, particularly at 429. There, speaking through Mr. Justice Brandeis, the Court said:

> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. . . ."

In the present case no one asserts that a cooperative group of individuals banded together to insure each other works an evil on any one or that it receives any benefit from legislation making it possible for inferior drivers to be insured.

The banking business may be regulated and interest rates fixed, but no one would assert that the State, decreeing it to be in the public interest for all people to be able to borrow money, could compel banks to lend to whomever a Bank Commissioner might assign.

THERE HAS BEEN NO DECLARATION OF PUBLIC POLICY BY THE STATE IN ANY TRUE SENSE.

The notion that it is the public policy of California to make appellant insure non-members actually involves a pyramid of fictions.

There is, first, the fiction that the state legislature has truly judged and appraised the problems presented and has selected a solution when in fact it has been a mere instrument for translating the selfish purposes of a pressure group into police compulsion. Second, there is the fiction that the expressions of state power with which we here deal are expressions of the legislature when in fact they represent the arbitrary exercise of power by an

administrative official and a private group antagonistic to the theory of self help through cooperation which appellant symbolizes. They represent a government by decree in the manner of the European dictators and the corporative state.*

Doubtless the first fiction is one behind which the Court may not look. Perhaps this is also true of the second fiction, since the distribution of legislative power among the organs of state government is said to be a matter of state concern. But that rule is not absolute. *Yick Wo v. Hopkins*, 118 U.S. 356 at 366, et seq., indicates that a delegation which is "purely arbitrary, and acknowledges neither guidance nor restraint" violates the due process clause of the 14th Amendment. And cf. *Washington Ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 122, and *Saia v. New York*, 334 U.S. 558.

Here the delegation to the Insurance Commissioner of the power to determine the identity of those whom insurers should be compelled to insure was limited only by such standard as may be spelled out of the words "in good faith entitled." (See p. 13, supra.) This is no standard at all. Until the adoption of the statute no one was entitled to obtain insurance from an insurer who did not wish to give it, and the very purpose of the statute was to entitle *some* people. Yet the qualifying phrase "in good faith" shows that not all people are "entitled," and as a standard it is meaningless. It was paraphrased in appellee's arguments below

---

*Dr. Franz Neumann, "Behemoth, The Structure and Practice of National Socialism" (Oxford University Press, 1942), shows how the German republic collapsed and Naziism strangled the land because of "the shift [of] the center of gravity from the legislature to the bureaucracy" (E.g., pp. 24-29, 51, et seq.).

Vyshinsky, "The Law of the Soviet State" (MacMillan 1948), quoting Lenin, jibes (314-315):

> "Look at any parliamentary country you like, from America to Switzerland . . . . The real 'state' work is done behind the scenes, and carried out by departments, chancelleries, and staffs. In parliaments they merely babble—with the special purpose of fooling 'simple folk'."

as a standard that every person "is entitled to get insurance unless in some fashion his record would show to a person of any sense of reason or balance that he was not." Such a test amounts to no more than the subjective feeling of the Insurance Commissioner that someone is entitled to something to which he was never entitled before. In the language of the New York Court of Appeals *(Lyons v. Prince,* 281 N.Y. 557, 24 N.E.2d 466, 469), there is here no limitation "except the usual implied limitation, to which even legislative bodies are subject, that the determination must be reasonable." As the court there added, that is no standard at all. It is striking that nowhere in the opinion of the court below is there any attempt to define the standard for the Commissioner's guidance.

However, even if the Court should not be free to pierce the fictions, it may recognize that they exist, in judging whether the statute violates due process in other respects.

Here the Assigned Risk Plan was the work of a committee of commercial insurers.* As the court below states in its opinion, "The Assigned Risk Plan [was] proposed by the automobile insurers operating in the state" (R. 178). When this plan, so proposed, was under consideration, and appellant stated its willingness to accede if it were not required to insure non-members, its request was rejected because "not acceptable to the Commissioner *nor to the committee*" (R. 178).

---

*Antagonism and jealousy of corporations operating for profit toward cooperatives is nothing new. Cf. Hulbert, Legal Phases of Cooperative Associations (Bulletin No. 50, Farm Credit Administration, U. S. Department of Agriculture), p. 2. Efforts to have legislative bodies strip cooperatives of special privileges conferred by law are common. Note efforts of the "Tax Equality League" to induce Congress to repeal the exemption from federal income taxation of cooperatives (House Ways & Means Committee Hearings on Cooperative Organizations, November 4-26, 1947. But the present case affords perhaps the first example of an attempt—not to strip a cooperative of special privileges conferred by law—but to destroy its essential nature as a cooperative.

CONCLUSION

We submit that the decision of the court below presses the power of the state over its citizens beyond any limit heretofore countenanced. It is not an example of an old principle but the creation of a new.

We submit that the California Assigned Risk Law and Assigned Risk Plan, in seeking to compel appellant to insure non-members of California State Automobile Association, and the order of the Insurance Commissioner suspending the appellant's right to transact automobile liability insurance in California because of its refusal to subscribe to the plan, violate the Fourteenth Amendment to the Constitution of the United States. The judgment of the court below should be reversed with directions to enter judgment accordingly.

San Francisco, California,
January 19, 1951.

Respectfully submitted;

MAURICE E. HARRISON,
MOSES LASKY,
HERMAN PHLEGER,
Attorneys for Appellant.

BROBECK, PHLEGER & HARRISON,
Of Counsel.

(Appendices follow)

Appendices

APPENDIX I

California Assigned Risk Law

(Stats. 1947, Ch. 39, p. 525, as amended, Stats. 1947, Ch. 1208, p. 2714, constituting sections 11620-11627, Insurance Code)

Section 11620:

"The commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. The commissioner may approve or issue reasonable amendments to such plan if he first holds a public hearing to determine whether the amendments are in keeping with the intent and purpose of this section. All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein.

"Notice of the public hearings required by this section shall be published, not less than ten (10) days nor more than thirty (30) days prior to such hearings, in two newspapers of general circulation, one published in the City and County of San Francisco, and the other published in the City of Los Angeles."

Section 11621:

"Such plan shall not require assignments to be made to an insurer which (a) does not transact automobile bodily injury and property damage liability insurance, (b) has withdrawn from this State pursuant to and in compliance with Article 15, Chapter 1, Part 2, Division 1 of this code, or (c) has discontinued the execution of new or renewal contracts of automobile bodily injury and property damage liability insurance, and has notified the com-

missioner of such discontinuance. In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

Section 11622:

"Such plan shall require the issuance of a policy affording coverage in the amount of five thousand dollars ($5,000) for bodily injury to or death of each person as a result of any one accident and, subject to said limit as to one person, the amount of ten thousand dollars ($10,000) for bodily injury to or death of all persons as a result of any one accident, and the amount of five thousand dollars ($5,000) for damage to property of others as a result of any one accident, but shall not require the issuance of a policy affording coverage in excess of said amounts."

Section 11623:

"To carry out the purpose of this article, the subscribing insurers may form their own organization which shall, subject to review by the Insurance Commissioner, administer and operate the plan. The cost of such organization shall be fairly proportioned among the subscribing insurers to whom assignments may be made."

Section 11624:

"Such plan shall contain:

(a) Standards for determining eligibility of applicants for insurance, and in establishing such standards the following may be taken into consideration in respect to the applicant or any other person who may reasonably be expected to operate the applicant's automobile with his permission:

(1) His criminal conviction record;

(2) His record of suspension or revocation of a license to operate an automobile;

(3) His automobile accident record;

(4) His age and mental, physical and moral characteristics which pertain to his ability to safely and lawfully operate an automobile;

(5) The condition or use of the automobile.

(b) Procedures for making application for insurance, for apportionment of eligible applicants among the subscribing insurers and for appeal to the commissioner by persons who believe themselves aggrieved by the operation of the plan,

(c) Rules and regulations governing the administration and operation of the plan,

(d) Provisions showing the basis upon which premium charges shall be made and

(e) Such other provisions as may be necessary to carry out the purpose of this article."

Section 11625:

"If an insurer admitted to transact liability insurance fails to subscribe to the plan or to any amendments thereto, the commissioner shall give 10 days' written notice to such insurer to so subscribe. If such insurer fails to comply with such notice, then the commissioner may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe. Proceedings under this section shall be conducted in accordance with Chapter 5, Part 1, Division 3, Title 2 of the Government Code, and the commissioner shall have all the powers granted therein."

Section 11626:

"If the commissioner, after hearing upon not less than ten (10) days' notice, finds that any insurer has failed to perform any of the duties required of it by this article or by the plan, other than those duties enumerated in Section 11625, he may issue an order to such insurer specifying in what manner and to what extent he

finds the insurer to have so failed and requiring, within a reasonable time, not less than 10 days, compliance with such requirements. If within the period specified in the order the insurer fails to comply with such order, such insurer shall, in addition to any other penalty provided by law, forfeit to the State a penalty of five hundred dollars ($500) for each such failure. The commissioner may bring an action in his own name against the insurer to collect the said penalty."

Section 11627:

"In this article, 'insurer' includes reciprocal or interinsurance exchanges."

APPENDIX II

California provisions concerning reciprocals. (Insurance Code)

Section 1300:

"Any persons may exchange reciprocal or interinsurance contracts with one another providing insurance other than life or surety, among themselves against any loss which may be insured against under other provisions of law."

Section 1301:

"Such persons are termed subscribers."

Section 1302 permits corporations to be subscribers.

Section 1303:

"The organization under which such subscribers so exchange contracts is termed a reciprocal or interinsurance exchange."

Section 1304 provides that the name of the organization or of the attorney in fact shall not be confusingly similar to the names of other insurers or attorneys in fact.

Section 1305:

"Such contracts may be executed by an attorney-in-fact, agent or other representative duly authorized and acting for such subscribers under powers of attorney. Such authorized person is termed the attorney, and may be a corporation."

Section 1306 relates to the location of the principal office of the attorney.

Section 1307:

"The power of attorney and contracts made thereunder may:

"(a) Provide for the right of substitution of attorney and revocation of the contract or power.

"(b) *Impose such restrictions upon the exercise of the power as are agreed upon by the subscribers.*

"(c) Provide for and limit the maximum amount to be paid by subscribers, except that contracts of exchanges writing either liability or workmen's compensation insurance shall be subject to the provisions of Article 6 of this chapter.

"(d) Provide for the exercise of any right reserved to the subscribers directly or through a board or other body."

Section 1308:

"The body exercising the subscribers' rights shall be selected under such rules as the subscribers adopt. It shall supervise the finances of the exchange and shall supervise its operations to such extent *as to assure conformity with the subscriber's agreement and power of attorney.*"

Section 1320:

"The attorney shall verify and cause to be filed with the commissioner copies of the following forms used by the exchange:

"(a) The form of the power of attorney.

"(b) The form of each application for insurance and the form of each contract for exchange of indemnity.

"(c) Every amendment to such forms."

Section 1450:

"The exchange may sue or be sued in its own name as in the case of an individual. Any judgment rendered against the exchange shall be binding upon each subscriber only in such proportion as his interests may appear."

APPENDIX III

California provisions referred to in section relating to jurisdiction

Constitution, Article VI:

Sec. 4: The Supreme Court . . . shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. . . .

Sec. 4b: The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; also . . . in proceedings of mandamus. . . .

Sec. 4c: The Supreme Court shall have power . . . to order any cause pending before a district court of appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within 15 days in criminal cases, or 30 days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of 15 days in criminal cases, or 30 days in all other cases, after the same shall have been pronounced.

Code of Civil Procedure:

Sec. 961: The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State. . . .

Rules on Appeal:

Rule 27:

(a) The Supreme Court or a District Court of Appeal may grant a rehearing in any cause after its own decision; and any cause pending in a department of the Supreme Court may be ordered heard by the Supreme Court in bank. A rehearing or hearing in bank may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to the time the decision becomes final therein.

(b) A party seeking a rehearing in a criminal case in the District Court of Appeal must serve and file a petition for rehearing within 8 days after the filing of the decision. A party seeking a rehearing in any other case, either in the District Court of Appeal or in the Supreme Court, or a hearing by the Supreme Court in bank after a decision in department, must serve and file a petition therefor within 15 days after the filing of the decision. The same number of copies shall be filed as is required by Rule 16.

* * * * * * *

Rule 28:

(a) Within 30 days in criminal causes, and 60 days in other causes, after the filing of a decision of the District Court of Appeal, the Supreme Court, on its own motion, or on petition, may order the cause transferred to itself for hearing and decision.

(b) A party seeking a hearing must serve and file a petition therefore within 22 days in criminal causes, and 40 days in other causes, after the filing of the decision of the District Court of Appeal.